Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

THERESE BALLET LYNN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

When a professor denied tenure claims employment discrimination, can a university claim a qualified privilege to maintain in confidence the identities of faculty peer reviewers where they have been promised confidentiality in the submission of their evaluations of the quality of the plaintiff's work and where the plaintiff has access to a comprehensive summary of the substance of the confidential evaluations?

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The Regents of the University of California (the "University") petitions for a Writ of Certiorari to review the opinion, as amended, and the judgment of the United States Court of Appeals for the Ninth Circuit. On December 28, 1981, the original opinion of September 12, 1981 was amended for the last time and the University's Petition for Rehearing was denied.

OPINIONS BELOW

The first opinion of the Court of Appeals (Appendix A, *infra*) is not reported. The opinion of the Court of Appeals as amended

on December 18, and December 28, 1981 (Appendix B, *infra*), is reported at 656 F.2d 1337. The December 28, 1981, order denying the University's Petition for Rehearing as to the first opinion and further amending the second opinion (Appendix C, *infra*) is not reported. The order denying the University's Petition for Rehearing as to the second opinion and treating that Petition for Rehearing as a motion to recall the mandate (Appendix D, *infra*) is not reported. The opinion of the district court (Appendix E *infra*), its findings of fact and conclusions of law (Appendix F, *infra*) and its judgment (Appendix G, *infra*) are not reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 12, 1981, and amended on December 18, and December 28, 1981. A timely Petition for Rehearing En Banc was denied on December 28, 1981, and this Petition for a Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 United States Code section 1254 (1).

QUESTION PRESENTED

When a professor denied tenure claims employment discrimination, can a university claim a qualified privilege to maintain in confidence the identities of faculty peer reviewers where they have been promised confidentiality in the submission of their evaluations of the quality of the plaintiff's work and where the plaintiff has access to a comprehensive summary of the substance of the confidential evaluations?

RULE INVOLVED

Federal Rules of Evidence rule 501 provides in pertinent part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in the

rules prescribed by the Supreme Court pursuant to a statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT OF THE CASE

Plaintiff, Therese Lynn, sued the University under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) claiming to have been denied tenure because of her sex and French national origin. (C.R. 1.)[1]

Tenure at the University of California is afforded only where a professor has an academic record of excellence in research, teaching, and university and public service. (Exhibits 37 and B; R.T. pp. 459-60, 475-76, and 547.) Consideration for tenure involves rigorous evaluations of the candidate in a series of independent and sequential levels—including the candidate's academic department (where the evaluations of outside scholars are solicited), the dean of the school, an ad hoc committee of outstanding scholars, and a standing committee of faculty—before a decision is ultimately rendered by the chancellor. (Exhibits 37 and B; R.T. pp. 456-60.) Under University regulations the names of scholars submitting reviews of the quality of work are maintained in confidence. But these regulations also incorporate safeguards against abuse: each of the five levels of review is independent from the other and each bases its recommendation only upon documents in the file; many of the substantive evaluations are made by committees; the campus employs an affirmative action officer to oversee the process; there is an appeal mechanism to a judicial body of peers; and each candidate participates in

1. "C.R.", "R.T." and "Exhibit" references are to the transcripts and exhibits of the trial court proceedings filed in the Court of Appeals.

the process by choosing the materials to be reviewed, and nominating outside scholars to review the work. In addition, the candidate has the right to receive a comprehensive summary of the substance of confidential peer reviews, excluding only the identities of the evaluators called upon to measure the candidate's performance and promise against the University's standard of excellence. (Ex. D; R.T. pp. 459, 463-64, 480, 577-78.)

During discovery Lynn requested the production of her complete academic review file, including the names of peer reviewers. She was provided instead with copies of every document in her file except for the confidential evaluations of the quality of her academic work and, as to those, she was provided with a comprehensive summary of their substance. (C.R. 8, Ex. 18; R.T. p. 334.) The University requested (C.R. 8) and was granted (C.R. 15) an order protecting the confidentiality of the actual texts of these peer evaluations which would necessarily reveal the identities of their sources. (Fed. Rules Evid., rule 501; *McKillop v. Regents of University of California*, 386 F.Supp. 1270 (N.D.Cal. 1975).)

At trial plaintiff again sought access to the entire file. The trial court again denied Lynn's request, but did order the University to provide the file for an *in camera* inspection so that it could determine whether it contained any evidence of discrimination. (R.T. pp. 217, 385.) The trial court did not thereafter turn over the documents to plaintiff, indicating it found no such evidence of discrimination.

Following trial, the court issued judgment in favor of the University finding that Lynn "failed to make out a prima facie case" (App. F, p. 50) and that, in any event, the University had "articulated legitimate and non-discriminatory reasons for not granting plaintiff tenure." (App. F, p. 50.) The court concluded:

> "Plaintiff [Lynn] was not treated disparately in teaching assignments or working conditions; she was denied tenure

based upon the composite academic conclusion that the quality of her scholarship was at a level not acceptable to the stringent demands of the University." (App. F, p. 50.)

The Court of Appeals reversed and ordered a new trial, holding that the failure to give Lynn the full texts of her confidential evaluations denied due process because it believed the trial court had received the complete tenure review file as evidence. This "finding" that the trial court used the file as evidence, rather than for an *in camera* review, is wholly unsupported by the record and contrary to the trial court's own remarks concerning its use of the file.[2]

The University recognizes that this finding that the tenure review file was used as evidence, unsupported though it is, does not constitute grounds for issuance of a writ of certiorari; the more damaging portions of the opinion to which this petition is principally addressed are the instructions to the trial court on remand.

First, the Court of Appeals' opinion forbids an *in camera*

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2. At the time the tenure review file was submitted to the court, counsel for the University suggested that

> "the court can look at the material *in camera* and determine based upon the balancing tests that we have argued in our motion for protective order whether you believe there is anything in the documents which indicates a bias or prejudice, such that would compel you to disclose this information for purposes of this case after review." (R.T. p. 385: 17-24.)

In response to this suggestion by counsel for the University, the trial court responded:

> "That is what I had in mind." (R.T. p. 385: 25.)

In its original opinion, the Circuit Court supported its argument that the tenure review file had been used as evidence by references in the trial court's opinion purportedly not otherwise found in the record. (App. A, p. 14.) When the University in its first Petition for Rehearing pointed out that these matters were, in fact, amply supported elsewhere in the record, the Ninth Circuit, in its amended opinion, eliminated those references but left intact its conclusion that the court had used the file as evidence. The opinion ignores totally the above-quoted language and instead cites only an excerpted description given the Court by University counsel of what was in the file. (App. B, p. 31; R.T. pp. 384-86.)

inspection of the file on retrial, ordering instead that the trial court strike an evidentiary balance without reference to the contents of the file. (App. B, p. 36, fn. 20.) In striking the balance the trial court is instructed to take into account the plaintiff's "strong" interest in receiving the complete file and the University's "minimal" interest in maintaining the confidentiality of its sources, given the fact that a renegade member of one faculty committee reviewing Lynn's scholarship had disclosed to plaintiff the names of some, but not all, of those submitting confidential evaluations. (App. B, p. 36.)[3]

Second, and most importantly, while the opinion pays lip service to a legal standard for future cases which would require a balancing of the University's interest in confidentiality against a plaintiff's need for the information, it effectively instructs trial courts to strike that balance in favor of plaintiffs in future Title VII cases:

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3. The appeals court does not explain why the improper disclosure of the identity of Professor "A" would diminish the University's interest in maintaining in confidence the identity of Professor "B"; and we can think of no reason why this should be so.

The Court of Appeals also suggests that confidentiality should be breached because the University's defense had rested on Lynn's deficient scholarship. In fact, however, the University's defense consisted of proof of the even-handed application of the peer review system to Professor Lynn, not the deficiency of her scholarship. The University offered no evidence as to the quality of Lynn's scholarship except for the ultimate conclusion reached at the end of the review process that her work did not meet the standard of excellence for promotion to tenure. If this is a defense resting on deficient scholarship then no defense would not so rest and, under the Circuit Court's reasoning, confidentiality would be breached in every case. The University's defense was an effort to avoid the time-consuming and ultimately futile "trial" of whether the faculty evaluators were "correct" in their collective evaluation of Lynn's scholarship. The Court of Appeals' opinion here, however, affirmatively encourages such a trial. (Cf. *Johnson v. University of Pittsburgh*, 435 F.Supp. 1328 (W.D. Pa. 1977) where such a trial of a Title VII case consumed 74 days and included 1,000 exhibits, after which the trial court concluded that an award of tenure "by its very nature cannot be made by a court but must be made by the faculty, the administration and trustees of the university." (*Id.*, at 1353.))

"The Fourth Circuit has suggested, *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, and the Fifth Circuit has held, *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, that when evaluations serve as the alleged basis for the University's decision to deny tenure or promotion, the plaintiff's interest in proving his case outweighs the University's interest in protecting the confidentiality of a file and that in such cases the evaluations must be provided to the plaintiff. . . .

* * *

"Under *Jepsen* and *Keyes*, disclosure of the evaluations would be required. We agree fully with the views expressed by the Fourth and Fifth Circuits in that respect." (App. B, pp. 33, 34.)

Since all tenure decisions are based upon confidential evaluations, it is unlikely that a trial court in the Ninth Circuit can ever again protect confidentiality even where there has been no prior disclosure.[4]

ARGUMENT

The University seeks to promote to lifetime tenured positions only those few who are the finest scholars in their fields. This requires the most rigorous, candid, and searching evaluations of

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4. In light of their unqualified support of *Jepsen* and *Keyes*, quoted *supra*, we cannot credit the circuit court's statement that it does not decide the question of whether peer evaluations "are privileged in academic Title VII cases generally." (App. B, p. 32.) Similarly, in a footnote added at the time rehearing was denied, the opinion also professes not to reach the question of whether confidentiality could be protected by a system that provides for disclosure of the substance of evaluations, but retains in confidence the identities of the evaluators. (App. B, p. 34, fn. 16.) But this case squarely presents the question. The University of California's peer review system permits a tenure candidate to receive a full summary of his or her file, and Lynn received such a summary. The summary is in evidence. (Ex. 18.) In light of the record and the language quoted above effectively deciding against confidentiality, the protestations that these issues remain open are either meaningless window dressing or inconsistency which can only confuse trial courts on this issue of vital importance to major universities.

the quality of a candidate's work, and his or her potential for further breakthroughs at the frontiers of knowledge. There is virtually no unsuccessful candidate for tenure at the University whose work is not good—often quite good. The University strongly believes, however, that the question of whether the work is excellent demands candor of a type that cannot be maintained unless confidentiality is assured.

> "[T]his system of faculty selection has produced one of the finest, if not the finest, institutions of higher education in the country, and certainly the pre-eminent state university system." (*McKillop v. Regents of University of California*, 386 F.Supp. 1270, 1275 (N.D. Cal. 1975).)

As stated in the University's Academic Personnel Manual:

> "Judgments and evaluations are here involved, as distinguished from determinations of issues of fact. . . . Without such confidentiality the candid judgments of the best qualified evaluators would no longer be as extensively available. Experts in an academic field, able to provide useful appraisals of the qualifications and performance of an academic appointee in the University, are less likely to provide these indispensable critical evaluations if their written statements are not considered to be confidential documents. Many valuable intramural and extramural sources of expert judgment would be, quite understandably, anxious to avoid impairing personal relationships with professional colleagues by making candidly critical evaluations."
> (University of California, Academic Personnel Manual, § 165-10(b).)[5]

The judgment of the University of California that confidentiality of sources is essential to the peer review system upon which excellence is predicated is shared by virtually all, perhaps all, universities of similar quality. For example:

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5. Additionally, many eminent scholars will not be willing to take the time to submit evaluations if, in addition to the time voluntarily spent evaluating a candidate's work, they must anticipate that negative views will be subject to deposition and trial.

In a decision holding that the writer of a confidential peer evaluation is protected by the state constitutional right to privacy, the California Court of Appeal quoted as follows from the testimony of the vice provost and dean of research at Stanford University:

> " 'The quality of our faculty depends on the soundness of the faculty peer evaluations and the honesty with which they are expressed. We are persuaded that the need to encourage candor, and to assure our faculty that candor will not destroy collegial relations among faculty members, require that peer evaluations be held in confidence.' " (*Board of Trustees v. Superior Court* [Dong], 119 Cal.App.3d 516, 527 (1981).)

In a presentation to the national Privacy Protection Study Commission the General Counsel of Harvard University stated:

> "Are people going to be willing to rank others in their profession and give reasons in writing for these rankings when the communication will be disclosed to the candidate and then perhaps to others? Will a professor be willing to write that in his view the candidate will never make a significant contribution to society's knowledge in biology when the person being judged will see the letter and, if the judgment of others is different, the candidate will become a departmental colleague of his for 15 years? We think not."
>
> (Statement to the Privacy Protection Study Commission at Rayburn House Office Building, p. 8 (Dec. 17, 1976), by D. Steiner, General Counsel to the University, Harvard University.)

The University of Chicago's "Report of the Committee on Confidentiality in Matters of Faculty Appointment," *The University of Chicago Record* (1979) pp. 165, 166, concluded that

> "Nowhere is the expectation of confidentiality more important than in the appointive process. Because members must work with one another as peers over a number

of years, and in the case of tenure appointments perhaps over a number of decades, the utmost candor is essential in the evaluative process."

The American Council on Education, representing more than 1,300 institutions of higher education, also supports the need for maintaining the confidentiality of sources in faculty peer evaluations:

"Without the assurance of confidentiality higher education may risk a revival of appointment and advancement processes that rely primarily on informal conversations and oral evaluations which are a potentially deeply-discriminatory means of evaluation that current promotion and tenure processes and public laws are, in fact, intended to expunge."

("Confidentiality of College and University Faculty Personnel Files: Its Appropriate Role in Institutional Affairs," No. 7 *Guidelines for Colleges and Universities* (Dec. 7, 1981.)

And at its 1978 meeting, the Senate of the National Association of State Universities and Land Grant Colleges, an association of more than 100 institutions of higher education, resolved that "confidentiality of such expert appraisals [of candidates for faculty appointments] must be protected in order that the University will be able to obtain full, useful and frank evaluations, . . ."

(Resolution adopted at the Annual Conference by the Senate of the National Association of State Universities and Land Grant Colleges (Nov. 15, 1978).)

In his concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), Justice Frankfurter suggested that an institution of higher education should be granted the discretion "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." (See, also, *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967); *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978). (Powell, J.).)

Since confidentiality of sources in the peer review system plays an essential part in determining who may teach it is, at the least, entitled to considerable weight in striking an evidentiary balance under Federal Rules of Evidence rule 501. (See *S. Simpson Gray v. Board of Higher Education, City of New York*, 90 F.R.D. 87 (S.D.N.Y. 1981) certified for interlocutory appeal on December 15, 1981; Note, *Preventing Unnecessary Intrusions On University Autonomy; A Proposed Academic Freedom Privilege*, 69 Cal. L. Rev. 1538 (1981); Bunzel, "The Eclipse of Confidentiality," *Change* (Oct. 1975).)

The questions of whether the interests of universities in maintaining confidentiality of sources gives rise to a qualified evidentiary privilege and, if so, under what circumstances it can be overcome raise important questions of federal evidentiary law which must ultimately be decided by this Court. (Cf., *In re James A. Dinnan (Blaubergs v. Board of Regents Georgia)*, 661 F.2d 426 (5th Cir. 1981) with *S. Simpson Gray v. Board of Higher Education, City of New York*, 90 F.R.D. 87 (S.D.N.Y. 1981), and *McKillop v. Regents of University of California*, 386 F.Supp. 1270 (N.D.Cal. 1975).)

The University recognizes that any confidential system has potential for abuse. This is why the University has established its many levels of independent review with opportunities for the candidate to participate and to appeal to a committee of peers and to receive a comprehensive summary. The University administration and its faculty believe that this system reduces the likelihood of bias or impropriety to insignificance, especially when compared to the overriding necessity to maintain confidentiality of its sources to preserve excellence. (C.R. 8.)

The University does not suggest that the rules of confidentiality can never be breached. Rather, it is proposed that courts be encouraged to use the tool of the *in camera* inspection, as suggested by this Court in *Kerr v. United States District Court*,

426 U.S. 394, 405-06, and to surrender the confidential contents of an academic file only where the court (or some impartial academician designated to serve as special master) is first satisfied that the University's summaries are unfair or inaccurate, or that the file contains some evidence of improper discrimination against the plaintiff. The opinion of the court below would not permit that result but would, in effect, require the breach of confidentiality of sources in all cases.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A

[No. 79-3384. Sept. 21, 1981.]

THERESE BALLET LYNN and all others similarly situated, Plaintiffs-Appellants v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant-Appellee.

REINHARDT, C.J.: Therese Ballet Lynn was an assistant professor at the University of California at Irvine. She was denied merit salary increases and tenure. Lynn filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*, alleging sex discrimination.Following trial, the district court entered judgment for the University. In her complaint Lynn also alleged discrimination on the basis of national origin; however, she has not pursued that claim.

Lynn was first employed by the University as a lecturer in 1961. She was promoted to assistant professor in 1971, and held that rank until leaving the University. She was denied a merit salary increase in 1971, after extramural evaluators judged her scholarship to be deficient. One evaluator was selected by the University, and one by Lynn. She was warned of deficient scholarship after internal reviews of extramural evaluations in both academic years 1972—1973 and 1973—1974. The latter evaluation was Lynn's mid-career review, pursuant to the University's policy that tenure be achieved within eight years or termination will result. She was given the opportunity to discuss her problems with members of her department, and during the 1974—1975 academic year was granted a sabbatical "for the explicit purpose of improving her scholarly research." Tenure review began in 1975 and culminated in the official denial of tenure by the University in June 1976. Lynn accepted the University's offer of a terminal one year appointment to June 1977.

The district court described the University's tenure review process as follows:

> The University has a tenure review system for promotion in which the excellence of a candidate's research, teaching, University and public service are judged. In order to receive

> candid evaluations from peers the reports of the various levels of review are confidential, as are the identities of an ad hoc review committee and the identities of extramural evaluators selected by the University. There are five levels of review in the tenure review process; each is independent of the other. The levels of review include that of the individual department of which the tenure candidate is a member, the dean of the school of which the department is a part, an ad hoc review committee, a review by the Budget Committee of the Academic Senate, review by the Office of Academic Affairs, and finally, review and decision by the Chancellor of the University of California, Irvine.

Lynn provided documentation and named extramural scholars for purposes of her tenure review; others were selected by her department chairman. The district court found after *in camera* review of the tenure review files that "[h]er work was favorably commented upon by a majority of these scholars." Nevertheless, denial of tenure was recommended at each level of the review process. After the denial, reconsideration was denied by the Budget Committee. A claim by Lynn, alleging discriminatory treatment, was then rejected by a special committee, after an investigation.

Lynn claims that she received disparate treatment from the University in its promotion and tenure decisions. The standards generally applicable to claims of disparate treatment under Title VII were laid down in *McDonnell Douglas Corp. v. Green*, [5 EPD ¶ 8607] 411 U.S. 792, 800, 93 S.Ct. 1817, 1823, 36 L.Ed. 2d 668 (1973). *See also Furnco Const. Corp. v. Waters*, [17 EPD ¶ 8401] 438 U.S. 567, 572—73, 98 S.Ct. 2943, 2947, 57 L.Ed.2d 957 (1978). In *McDonnell Douglas* the Supreme Court set forth the four elements necessary to establish a *prima facie* case of race discrimination under Title VII; the plaintiff must show:

1. that he belongs to a racial minority;
2. that he applied and was qualified for a job for which the employer was seeking applicants;

3. that, despite his qualifications, he was rejected; and

4. that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.

411 U.S. at 802, 93 S.Ct. at 1824 (footnote omitted). The Court cautioned that these four elements might not be necessarily applicable in every respect in all Title VII cases. *Id.* at 802, n.13, 93 S.Ct. at 1824.

The courts of appeals have consistently approved the application of the *McDonnell Douglas* test to charges of discrimination in the academic context.[1] The Fourth Circuit adopted the *McDonnell Douglas* elements and applied them to sex discrimination in the academic context. *Smith v. University of North Carolina*, [24 EPD ¶ 31,281] 632 F.2d 316 (4th Cir. 1980). In *Smith*, the Fourth Circuit described the elements of a *prima facie* case of Title VII discrimination by an institution of higher learning; it said that the plaintiff must show:

1. that she is a member of a class protected by Title VII;
2. that she was qualified for the position or rank sought;
3. that she was denied promotion or reappointment;
4. that in cases of reappointment (or tenure) others (i. e., males) with similar qualifications achieved the rank or position.

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1. *See, e. g., Kunda v. Muhlenberg College*, [22 EPD ¶ 30,674] 621 F.2d 532, 541—43 (3d Cir. 1980); *Whiting v. Jackson St. University*, [22 EPD ¶ 30,886] 616 F.2d 116, 120—21 (5th Cir. 1980); *Jepsen v. Florida Bd. of Regents*, [22 EPD ¶ 30,624] 610 F.2d 1379, 1382—83 (5th Cir. 1980); *Sweeney v. Board of Trustees of Keene St. College*, [20 EPD ¶ 30,221] 604 F.2d 106, 108 (1st Cir. 1979), *cert. denied*, [21 EPD ¶ 30,562] 444 U.S. 1045, 100 S.Ct. 733, 62 L.Ed.2d 731 (1980); *Davis v. Weidner*, [19 EPD ¶ 9118] 596 F.2d 726, 729—31 (7th Cir. 1979); *Powell v. Syracuse Univ.*, [17 EPD ¶ 8468] 580 F.2d 1150, 1154—56 (2d Cir.), *cert. denied*, [18 EPD ¶ 8686] 439 U.S. 984, 99 S.Ct. 576, 58 L.Ed.2d 656 (1978).

632 F.2d at 340. We agree that these are the applicable elements in such cases.[2]

The test set forth above is not an exclusive one. Plaintiffs may under some circumstances establish a *prima facie* showing of unlawful discrimination in Title VII cases without satisfying the four specific elements of *McDonnell Douglas* or *Smith*. The Supreme Court has expressly rejected the argument that meeting the specific *McDonnell Douglas* requirements is the "only means" by which plaintiffs may make the requisite *prima facie* showing. *Teamsters v. United States*, [14 EPD ¶ 7579] 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977). The key, the Court said, is simply that the "plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Id.* The Court subsequently explained that the plaintiff's initial burden is met where the plaintiff has shown that "it is more likely than not" that the employer's actions were based on unlawful considerations. *Furnco Construction Corp. v. Waters*, [17 EPD ¶ 8401] 438 U.S. 567, 576, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). Thus, in Title VII cases involving institutions of higher learning, plaintiffs may establish their *prima facie* case by a sufficient showing as to the four *Smith* elements or by offering other evidence which creates the inference that the complained of act was unlawful.

In *McDonnell Douglas*, the Court also established certain procedures governing the trial of Title VII cases. The "order and

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2. Although, *Smith*, like the case before us involves sex discrimination, and the four elements of plaintiff's *prima facie* case are here described in those terms, the same elements are applicable to claims of race discrimination in the academic context. Moreover, these elements are not applicable solely to claims relating to tenure, reappointment, or promotion, but with appropriate modifications, are also applicable to other Title VII claims involving faculty members, including initial hiring determinations.

allocation of proof" are as follows: (1) the plaintiff must come forward with evidence sufficient to constitute a *prima facie* case of discrimination; (2) the defendant must then "articulate" a legitimate non-discriminatory reason for the adverse employment decision; and (3) the plaintiff must then be given the opportunity to show that the "assigned reason" was "a pretext or discriminatory in its application." *McDonnell Douglas*, 411 U.S. at 807, 93 S.Ct. at 1827.

The district court held, without discussing the four elements that establish a *prima facie* case under *McDonnell Douglas* and *Smith*, that Lynn failed to make the required showing. In the alternative, the district court held that the University "articulated legitimate and non-discriminatory reasons for not granting Lynn tenure." We assume, for purposes of our analysis, that the district court implicitly found that Lynn failed to show that the University's articulated reasons were "a pretext or discriminatory in [their] application."

The district court clearly erred in concluding that Lynn failed to establish a *prima facie* case of discrimination based on sex. "The burden of establishing a *prima facie* case is not onerous." *Texas Dept. of Community Affairs v. Burdine*, [25 EPD ¶ 31,544] —, U.S. —, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). Lynn obviously satisfied elements (1) and (3) of the *McDonnell Douglas* test as applied by *Smith* in the academic context. She also adduced sufficient evidence as to elements (2) and (4) to satisfy her initial burden. In addition to testimony and documentary evidence, Lynn submitted two types of statistical data; the first, which we refer to as "specific statistical data," tended to show that she met the objective criteria for tenure, and the second, which we refer to as "general statistical data," tended to show a general pattern of discrimination by the University in favor of men.

Lynn's specific statistical data, relating to the objective criteria for tenure, provided evidence that she had the same education,

experience and number of published works as others who had been granted tenure. For purposes of deciding whether Lynn has established a *prima facie* case we find the specific statistical data submitted to be highly persuasive. It supports Lynn's contentions that she "was qualified for the position or rank sought," *i. e.*, element (2), and that "others (i.e., males) with similar qualifications achieved the rank or position," *i.e.*, element (4).

The general statistical data submitted by Lynn, as mentioned, provides evidence of a pattern of academic sex discrimination by the University. The district court described the University's past practices as follows:

> Over the years University administrators have shown a lack of concern for the need for minority and female faculty members, and such indifference persists. Even though the University of California at Irvine maintains an Affirmative Action Program, statistical summaries still display an under utilization of these groups.

Later in its memorandum, the district court noted "since its founding, Irvine has granted tenure to 26 men and only two women—the last woman tenured was in 1972."

The Supreme Court has stated that general statistical data is helpful in individual employment discrimination cases. *McDonnell Douglas*, 411 U.S. at 805, 93 S.Ct. at 1825. It is particularly helpful in the academic context, where the tenure decision is highly subjective. *Cf. Rowe v. General Motors*, [4 EPD ¶ 7689] 457 F.2d 348 (5th Cir. 1972).[3] It is relevant despite the fact that the

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3. Reliance on statistical proof at the *prima facie* case stage is not only practical, but also represents sound policy. The ultimate issue in a case like the one before us is whether the tenure decision was made on the basis of merit or on the basis of sex. Often, there is little direct evidence that plaintiffs can obtain when attempting to show that the decision was based on sex, *i. e.*, that there was discrimination in an individual hiring decision. Despite such problems of proof, Congress entrusted to the courts the responsibility of providing a forum for the litigation of claims

data may not be directly probative of any of the four specific elements set forth by *McDonnell Douglass* and *Smith*. Proof of a general pattern of sex discrimination is, in any event, evidence which tends to establish that it is "more likely than not" that a University's decision to deny tenure was based on sex, "a discriminatory criterion illegal under the Act." *See Furnco Construction Corp.*, 438 U.S. at 576, 98 S.Ct. at 2949 (*quoting Teamsters*, 431 U.S. at 358, 97 S.Ct. at 1866).

In addition, testimony at trial revealed that the University's evaluation of Lynn's scholarship was due, in part, to its view that women's studies is not a substantial topic for scholarly work.[4] The district court stated:

> The criticism leveled at her work by scholars and administration officials appears to reflect their disdain of this [women's studies] as a topic of substance in a scholarly work.

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of discrimination in universities and other institutions of higher learning. *Powell v. Syracuse University*, [17 EPD ¶ 8468] 580 F.2d 1150, 1154 (2d Cir. 1978); The Equal Employment Opportunity Act of 1972, 86 Stat. 103, sec. 3 (1972). Although statistical data does not provide direct evidence of discrimination in the individual hiring decision, use of such data is an effective method of proof, and, accordingly, an effective method by which to discharge our responsibility under Title VII. Moreover, its use has another substantial benefit. Statistical evidence does not deal with the merits of the university's tenure decision, which necessarily involves academic judgments. Its use thus allows us "to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior" proscribed by Title VII. *Powell*, 580 F.2d at 1154.

We do not suggest that avoiding review of internal university processes is an overriding policy. To the contrary, by amending Title VII to cover educational institutions, Congress "evidenced particular concern for the problem of employment bias in an academic setting." *Powell*, 580 F.2d at 1154, and thereby made the decision that the broad societal interest in eliminating discrimination should be of overriding concern in Title VII cases in the academic context. We note only that the use of statistical data minimizes the possibility that courts will substitute their judgments for those of university personnel while providing courts with an effective tool with which to enforce Title VII.

4. Lynn's study of French literature concentrated heavily on women's issues, *e. g.*, the influence of women on the development of French literature.

> I find their lack of enthusiasm for her effort may stem from their belief that woman's (sic) studies was an unworthy topic to pursue.

The district court concluded, however, that the University's lack of enthusiasm towards women's studies was not evidence of discrimination because the University would have had the same objection if a man concentrated his studies on women's issues. We do not agree. A disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of a discriminatory attitude towards women.[5] The existence of a discriminatory attitude, like general statistical data, tends to establish that it is more likely than not that the University's decision was based on an impermissible criterion, and therefore tends to establish Lynn's *prima facie* case.

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5. While we might not have made the statement in the text which accompanies this note a number of years ago, today its truth seems self-evident. The history of our nation reflects the evolution of our understanding of the nature of man (in the generic sense of the word) and the legitimate aspirations and rights of the individual. Attitudes which seemed benign at one time are now understood to be discriminatory. *Compare Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) with *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). The beliefs that women should not have the right to vote, practice law, or serve on the United States Supreme Court, were once reflective of majority view, and the law. We now understand, somewhat belatedly, that these concepts reflect a discriminatory attitude. Today any person is free to hold to such concepts, but such concepts may not serve as the basis for job-related decisions in employment covered by Title VII. Other concepts reflect a discriminatory attitude more subtly; the subtlety does not, however, make the impact less significant or less unlawful. It serves only to make the courts' task of scrutinizing attitudes and motivation, in order to determine the true reason for employment decisions, more exacting. We are sensititve to the problems related to judicial examination of issues like the importance of women's studies, and to the need for courts to refrain from substituting their judgment for that of educators in areas affecting the content of curricula. Accordingly, the view we express is a narrow one. We are saying only what Title VII commands: when plaintiffs establish that decisions regarding academic employment are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such discriminatory attitudes, however subtly, courts are obligated to afford the relief provided by Title VII.

After consideration of both types of statistical proof, and the other evidence submitted at trial, we believe it is clear that the district court's finding that Lynn failed to satisfy her initial burden of establishing a *prima facie* case was erroneous.

Next, we turn to whether the University "articulated" reasons for its denials of merit salary increases and of tenure. The University argues that its denials were based on deficiencies in Lynn's scholarship.

A *prima facie* case "raises an inference of discrimination." *Furnco Construction Corp.*, 438 U.S. at 577, 98 S.Ct. at 2949. "To dispel the adverse inference from a *prima facie* showing under *McDonnell Douglas*, the employer need only 'articulate some legitimate, non-discriminatory reason for the employee's rejection.'" *Id.* at 578, 98 S.Ct. at 2950, *quoting McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. The Court, in *Board of Trustees of Keene St. Col. v. Sweeney*, [18 EPD ¶ 86731] 439 U.S. 24, 25, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978), made it clear that the burden of "articulating some legitimate, non-discriminatory reasons" is significantly less than proving the absence of discriminatory motive.[6] Accordingly, the court held in *Burdine* that the defendant-employer need not prove by a preponderance of the evidence that the plaintiff was rejected for a legitimate, nondiscriminatory reason, and the court there stated that "[i]t is sufficient if the defendant's *evidence* raises a genuine issue of fact as to whether it discriminated against the plaintiff." 101 S.Ct. at 1094 (emphasis added) (footnote omitted).[7]

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6. The Court reasoned that if employers were required to prove the absence of discriminatory motive, the third stage of the *McDonnell Douglas* analysis would be superfluous, "since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring contrary proof from the employee as a part of the third step." *Board of Trustees of Keene St. Col. v. Sweeney*, [18 EPD ¶ 8673] 439 U.S. at 24 n.1, 99 S.Ct. at 295 n.1.

7. Although prior decisions had spoken only of "articulating" a reason, *Burdine* makes it clear that the defendant must produce some evidence to rebut the plaintiff's case. 101 S.Ct. at 1094.

The evidence offered by the University shows that throughout Lynn's career she was warned that her scholarship was suspect. As mentioned earlier, she was given the opportunity to discuss her problems with members of her department, and after her mid-career review, she was granted sabbatical leave for the explicit purpose of improving her research and writing skills. It was Lynn's deficient scholarship that the tenure review committee claims was the basis of its decision not to recommend merit increases or tenure. Without doubt deficient scholarship is a legitimate, non-discriminatory reason to deny salary increases or tenure. In view of the standard set forth in *McDonnell Douglas, Sweeney* and *Burdine,* and the relative ease with which the courts of appeals have found the employer's burden to be satisfied in the academic context, *see, e.g., Smith v. University of North Carolina.* 632 F.2d 316, we agree that the University successfully "articulated" reasons that justify its actions, *i.e.,* it offered evidence supporting its reasons for denying Lynn tenure.

Under some views of the *McDonnell Douglas* analytical process, the University's articulated reason and supporting evidence might be considered at step one of that process, *i.e.,* in connection with plaintiff's *prima facie* showing that she possesses the requisite qualifications for tenure. *See Leiberman v. Gant,* 630 F.2d 60, 64 (2d Cir. 1980). We think it preferable, however, to consider the University's arguments at steps two and three. In our view, objective job qualifications are best treated at step one and subjective criteria, along with any supporting evidence, are best treated at the later stages of the process. To do otherwise would in many instances collapse the three step analysis into a single initial step at which all issues would be resolved. This would defeat the purpose underlying the *McDonnell Douglas* process. *See Sweeney,* 439 U.S. at 24, n.1, 99 S.Ct. at 295 n.1. In addition, addressing the University's arguments at the first step of the analysis would increase the possibility that courts will be required to engage in

evaluations of the performance of faculty members, a task to which others are better suited.[8]

From a practical standpoint, and despite our determination that evidence of the nature here involved should be considered in connection with steps two and three rather than step one, it should make little difference to the outcome which way the evidence is analyzed. If evidence relating to subjective criteria is treated as relevant to step one, the plaintiff would be entitled, in connection with that aspect of the case, to show that the alleged criteria are inherently discriminatory or discriminatorily applied, or to show that notwithstanding the University's contentions, she meets the criteria. If offered by the University to meet its step two burden, the plaintiff must attempt to show that the reason offered is not the real explanation for the University's decision, but is merely an excuse for a discriminatory act. While it is true that the University need offer little evidence in support of its articulated reason in order to require plaintiff to proceed to step three, the more substantial the University's evidence the more persuasive plaintiff's step three evidence must be in order to establish that the articulated reason is pretextual or was discriminatorily applied. Regardless of the stage at which we consider evidence of the nature here involved, the plaintiff's ultimate burden remains the same, to show by a preponderance of the evidence that the University's action was based on unlawful discriminatory conduct.[9]

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8. The qualifications that are most appropriately considered at step one are those to which objective criteria can be applied, such as level of education, years of teaching experience, in general and at the particular institution, and the publication of scholarly materials. Where the basic objective criteria are not met, plaintiff has failed to establish a *prima facie* case. However, in some instances a showing of specific or general discriminatory conduct by a university through statistical or other evidence will be sufficient to raise doubts as to whether objective criteria are applied in a non-discriminatory manner. In those instances dismissal would not be proper, even though plaintiff has failed to show he has met the "objective criteria."

9. We should note that when evidence that supports the University's articulated reason is introduced during the plaintiff's presentation of his case, the plaintiff is required to counter such evidence and offer his proof as to pretext before resting. *See Correa v. Nampa School Dist. No. 131*, 645 F.2d 814 (9th Cir. 1981).

Since, as we concluded *ante*, the district court properly found that the University "articulated [a] legitimate, nondiscriminatory reason," we would ordinarily next determine if the reason "articulated" by the University was "a pretext or discriminatory in its application." However, we do not decide that issue here.

Throughout the proceedings below, Lynn was denied access to her tenure review file. The materials contained in the file were those upon which the tenure review committee claims that it based its denial of tenure, and, as such, are highly relevant to the issue in this case. At the discovery stage, when Lynn requested that the University produce the file, the district court issued a protective order. At trial, the University submitted the file to the court; the court reviewed it *in camera* but refused to disclose the contents of the file to Lynn. Lynn asserts that the file was submitted by the University, and used by the district court, as evidence, rather than for the purpose of determining whether the contents of the file were privileged.[10] Thus, Lynn contends that the refusal to disclose the contents of the file violated due process. We agree.[11]

During direct examination of Lynn, her attorney offered the minority report of the tenure review committee as evidence. In response, the following statements were made.

> Ms. Helwick (attorney for the University): The problem, your Honor, is that obviously, if this is admitted into evidence then we have a problem by way of a response, and then we get into the whole scholarly debate of the quality of Dr. Lynn's scholarship . . .

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10. Lynn's principal contention before this court, that she was entitled to access to the file and that the denial of access prevented her from having an adequate opportunity to prove discrimination within the meaning of Title VII, is discussed, *post*. *See* text accompanying note 12, *et seq.*

11. The University does not contend that it would be proper for the district court to have accepted and used the file as evidence without disclosure to Lynn. Rather, the University argues that the file was neither submitted, accepted nor used as evidence.

> The Court: I think I have to permit it to come in, even though it may place you in the position of having to counterbalance it. It is sort of like the position the government is put in when it wants to prosecute a person for some type of intrusion into government records, and in order to do it must bring forth those records . . .
>
> Ms. Helwick: . . . and I think that by submitting this document we will necessarily have to further violate the confidentiality of those same extramural scholars.
>
> The Court: Is it possible for you to meet this by showing content of the majority report but not authorship?
>
> Ms. Helwick: I think not, . . .
>
> The Court: Why can't it be submitted, then for *in camera* inspection of the Court and not of the plaintiff.
>
> Ms. Helwick: I have no objection to an *in camera* review by your Honor of the entire tenure review file, if you deem that appropriate.

The minority report was then admitted into evidence.

Later in the trial, the University presented the district court with the tenure review file for *in camera* inspection:

> Mr. Lundberg (attorney for the University): . . . And you have a portion of that which has been admitted as Exhibit 23 [the minority report]. But there is material you do not have, and we feel for purposes of your making a complete review that you ought to be provided with the file that was before the ad hoc review committee. This is what we propose to provide you.
>
> The Court: All right.[12]

The record leaves little doubt that the University submitted the tenure review file to counterbalance the effect of the minority report and that the district court acceded to this use of the file.

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12. Counsel for plaintiff repeatedly requested the right to see the file. When counsel for the University offered the file (three folders) to the court, saying "I would now submit them to the court, your Honor," plaintiff's counsel objected. In fact, she objected to even an inspection of the file by the court for the reason that plaintiff had not been allowed to see it.

Moreover, in its findings of fact, the district court wrote, "[h]er work was favorably commented upon by a majority of the scholars." And, in its Memorandum filed in May, 1977, the district court stated that "scholars who reviewed her work criticized the quality of her scholarship because they detected a 'trendy' flavor in the themes she tried to develop; they describe it as 'popularization.'" Careful review of the record has not revealed the source of these assertions. We are thus led to conclude that the source was the tenure review file. The district court, therefore, not only acceded to the University's submission of the file as evidence, but used the contents of the file in reaching its decision.

The receipt and review by the district court of the tenure review file for the purpose of assisting it to make factual determinations or to evaluate other evidence violated principles of due process upon which our judicial system depends to resolve disputes fairly and accurately. The system functions properly and leads to fair and accurate resolutions, only when vigorous and informed argument is possible. Such argument is not possible, however, without disclosure to the parties of the evidence submitted to the court. Thus, the district court's receipt and review of the file, without disclosure of its contents to Lynn, requires reversal of the order of the district court.

In view of our holding, we need not decide the question whether tenure review files, and more particularly peer evaluations, are privileged in academic Title VII cases generally. We do wish, however, to provide the district court with some guidance on the question since that court will be required, once again, to consider the issue of Lynn's right to obtain her tenure review file, upon remand.[13]

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13. While the remainder of our discussion is confined to future use of the tenure review file, we also note for the district court's benefit upon remand, that some of the evidence previously discussed in connection with plaintiff's *prima facie* case is also relevant with respect to

When determining whether tenure review files, including peer evaluations, are privileged, courts have balanced the university's interest in confidentiality, *i. e.*, in maintaining the effectiveness of its tenure review process, and the need which Title VII plaintiff's have for obtaining peer evaluations in their efforts to prove discriminatory conduct. *Jepsen v. Florida Bd. of Regents*, [22 EPD ¶ 30,624] 610 F.2d 1379, 1384—85 (5th Cir. 1980); *Keyes v. Lenoir Rhyne College*, [13 EPD ¶ 11,595] 552 F.2d 579, 581 (4th Cir.), *cert. denied* [15 EPD ¶ 7879] 434 U.S. 904, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977). In making that determination it is necessary to consider the importance of enabling plaintiffs to prove that discriminatory conduct has occurred, the difficulty of obtaining direct proof of discriminatory motivation and the strong national policy against discrimination in educational employment.

The Fourth Circuit has suggested, *Keyes v. Lenoir Rhyne College*, [13 EPD ¶ 11,595] 552 F.2d 579, and the Fifth Circuit has held, *Jepsen v. Florida Bd. of Regents*, [22 EPD ¶ 30,624] 610 F.2d 1379, that when evaluations serve as the alleged basis for the University's decision to deny tenure or promotion, the plaintiff's interest in proving his case outweighs the University's interest in protecting the confidentiality of a file and that in such cases the evaluations must be provided to the plaintiff. In *Keys*, the Fourth Circuit denied plaintiff's request for all peer evaluations for the entire faculty of the College. The court noted, however, that "if the College had sought to justify any male-female disparity on the basis of these evaluations the plaintiff should have been granted the opportunity to use them" to prove her case. 552

her efforts to establish that the University's articulated reason was "a pretext or discriminatory in its application." Evidence is not necessarily submitted solely to establish a *prima facie* case or to show pretext or discriminatory application; it may be used, when relevant, to establish either of plaintiff's steps in the *McDonnell Douglas* process or both. For example, general statistical data is relevant to a showing of discriminatory application, and thus may be used at the third step in the *McDonnell Douglas* process, *McDonnell Douglas*, 411 U.S. at 805, 93 S.Ct. at 1825, as well as at the *prima facie* step.

F.2d at 581.[14] The Fifth Circuit, in *Jepsen,* found the reasoning in *Keyes* to be "persuasive," and held that where "the university defends a claim of discrimination on the ground that promotional decisions were based solely on unbiased faculty evaluations which involved criteria unrelated to sex," a plaintiff is entitled to obtain the evaluations. 610 F.2d at 1384.[15]

The University claims that Lynn was denied tenure because of deficient scholarship. Since its view of Lynn's ability is based, in large part, on the content of the tenure review file, including peer evaluations, the University is defending, in essence, on the ground that its tenure decision with respect to Lynn was based on non-discriminatory peer evaluations. Under *Jepsen* and *Keyes,* disclosure of the evaluations would be required. We agree fully with the views expressed by the Fourth and Fifth Circuits in that respect. However, in Lynn's case it is not necessary to rely on the right of academic plaintiffs generally to obtain evaluations when a university has used the documents in reaching its deci-

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14. Keyes was a class action suit brought by a class plaintiff on behalf of the female faculty of Lenoir Rhyne College. The class plaintiff alleged sex discrimination in salaries and promotions. To show that the College's explanations for variances in salaries and promotions were pretextual, she requested, *inter alia,* peer evaluations for all members of the College faculty. It was in this context that the Fourth Circuit held that the evaluations need not be disclosed.

Keyes, the class plaintiff, also had an individual complaint against the College. She alleged that the College's decision to deny her request for an extension of tenure was made on the basis of sex. The College claimed that its denial was based solely on the fact that she was too old. The Fourth Circuit did not address the question of whether Keyes was entitled to her own evaluations. Nor did the Fourth Circuit reveal whether she in fact received these evaluations.

15. We believe the word "solely" was used for the purpose of reflecting accurately the use that the University actually made of the files in the case before the court. We do not believe the Fifth Circuit intended to limit its ruling to cases in which the university considered only faculty evaluations and to exclude from the operation of its rule cases in which the university considered other materials as well as faculty evaluations. We understand the rule which the court set forth to mean that the plaintiff must be permitted to obtain evaluations whenever the university's decision is based on them, in whole or in part.

sion. The record before us reveals that the University has far less interest in the confidentiality of Lynn's tenure review file than in the ordinary case in which disputes over such files arise.

Lynn received summaries of the comments of her evaluators, as do all University academic personnel when they so request.[16] Unlike the ordinary plaintiff, however, Lynn knew the names of her evaluators due to the fact that Dr. Nicole Marzac, in violation of the University rule, provided her with a copy of the minority report.[17] Moreover, Marzac provided Lynn with copies of letters written by Marzac to Chancellor Aldrich and to Professor Stephen, as well as the minutes of the meeting of the tenure review committee.[18] The final pieces of information undermining the confidentiality of the file were provided, at trial, by Professor Slim, chairman of the tenure review committee. Professor Slim was cross-examined on the proceedings that were conducted by the tenure review committee, and on the majority report. His testimony provided Lynn with further knowledge as to the personal views of the committee members.

Although it cannot be determined with certainty which members of the committee, or evaluators, made which comments, the documentary evidence in Lynn's possession, in addition to Marzac's description of that evidence in her deposition filed with the dis-

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16. University of California Rule 195—20, entitled "Access to Academic Personnel Records," protects individuals' rights to privacy and sets forth when, and to whom, academic records may be disclosed. The rule provides that an individual may inspect all documents except "confidential documents." Those deemed confidential are: (a) letters of evaluation submitted in confidence, (b) letters from the chairperson setting forth a departmental recommendation regarding appointment, promotion, merit increases, appraisal, reappointment, nonreappointment, or terminal appointment, or (c) reports, recommendations from ad hoc and standing committees. Rule 195—20b.(1). The rule also provides that an individual has the right to oral or written summaries of "confidential documents." Rule 195—20b(2).

17. Dr. Marzac authorized the minority report. The minority report represents the views of those who disagreed with the committee's recommendation that tenure be denied.

18. The letters and the minutes were subject to the confidentiality rule of the University and were not to be disclosed.

trict court and Slim's testimony at the trial make it possible to attribute specific views and attitudes to specific evaluators. Accordingly, the confidentiality of Lynn's file has been substantially diminished as a result of the information already in her possession.

The district court's determination as to whether and when Lynn may have access to her tenure review file for purposes related to a new trial should be reached in light of the strong interest which Lynn continues to have in determining whether the contents of the file will assist her in proving her case (and particularly in establishing that the University's articulated reason for denial of tenure was "a pretext or discriminatory in its application"), and the minimal interest that the University now has in preserving the vestiges of confidentiality in the file.[19]

The order of the district court is reversed and remanded for proceedings consistent with this opinion.

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19. Without suggesting that an *in camera* review would ever be appropriate in determining a plaintiff's entitlement to a tenure review file we note that, upon remand, the district court should determine any questions relating to Lynn's right to obtain her tenure review file without considering the nature of its content or making any *in camera* review thereof.

Appendix B

[No. 79-3384. Sept. 21, 1981, as amended Dec. 18, 1981.]

THERESE BALLET LYNN and all others similarly situated, Plaintiffs-Appellants v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant-Appellee.

AMENDED OPINION

REINHARDT, Circuit Judge.

Therese Ballet Lynn was an assistant professor at the University of California at Irvine. She was denied merit salary increases and tenure. Lynn filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*, alleging sex discrimination. Following trial, the district court entered judgment for the University. In her complaint Lynn also alleged discrimination on the basis of national origin; however, she has not pursued that claim.

Lynn was first employed by the University as a lecturer in 1969. She was promoted to assistant professor in 1971, and held that rank until leaving the University. She was denied a merit salary increase in 1971, after extramural evaluators judged her scholarship to be deficient. One evaluator was selected by the University, and one by Lynn. She was warned of deficient scholarship after internal reviews of extramural evaluations in both academic years 1972-1973 and 1973-1974. The latter evaluation was Lynn's mid-career review, pursuant to the University's policy that tenure be achieved within eight years or termination will result. She was given the opportunity to discuss her problems with members of her department, and during the 1974-1975 academic year was granted a sabbatical "for the explicit purpose of improving her scholarly research." Tenure review began in 1975 and culminated in the official denial of tenure by the University in June 1976. Lynn accepted the University's offer of a terminal one year appointment to June 1977.

The district court described the University's tenure review process as follows:

> The University has a tenure review system for promotion in which the excellence of a candidate's research, teaching, University and public service are judged. In order to receive candid evaluations from peers the reports of the various levels of review are confidential, as are the identities of an ad hoc review committee and the identities of extramural evaluators selected by the University. There are five levels of review in the tenure Review process; each is independent of the other. The levels of review include that of the individual department of which the tenure candidate is a member, the dean of the school of which the department is a part, an ad hoc review committee, a review by the Budget Committee of the Academic Senate, review by the Office of Academic Affairs, and finally, review and decision by the Chancellor of the University of California, Irvine.

Lynn provided documentation and named extramural scholars for purposes of her tenure review; others were selected by her department chairman. The district court found, after *in camera* review of the tenure review files that "[h]er work was favorably commented upon by a majority of these scholars." Nevertheless, denial of tenure was recommended at each level of the review process. After the denial, reconsideration was denied by the Budget Committee. A claim by Lynn, alleging discriminatory treatment, was then rejected by a special committee, after an investigation.

[1] Lynn claims that she received disparate treatment from the University in its promotion and tenure decisions. The standards generally applicable to claims of disparate treatment under Title VII were laid down in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668 (1973). *See also Furnco Const. Corp. v. Waters*, 438 U.S. 567, 572-73, 98 S.Ct. 2943, 2947, 57 L.Ed.2d 957 (1978). In *McDonnell Douglas* the Supreme Court set forth the four elements necessary to establish a *prima facie* case of race discrimination under Title VII; the plaintiff must show:

1. that he belongs to a racial minority;
2. that he applied and was qualified for a job for which the employer was seeking applicants;
3. that, despite his qualifications, he was rejected; and
4. that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.

411 U.S. at 802, 93 S.Ct. at 1824 (footnote omitted). The Court cautioned that these four elements might not be necessarily applicable in every respect in all Title VII cases. *Id.* at 802 n.13, 93 S.Ct. at 1824.

The courts of appeals have consistently approved the application of the *McDonnell Douglas* test to charges of discrimination in the academic context.[1] The Fourth Circuit adopted the *McDonnell Douglas* elements and applied them to sex discrimination in the academic context. *Smith v. University of North Carolina*, 632 F.2d 316 (4th Cir. 1980). In *Smith*, the Fourth Circuit described the elements of a *prima facie* case of Title VII discrimination by an institution of higher learning; it said that the plaintiff must show:

1. that she is a member of a class protected by Title VII;
2. that she was qualified for the position or rank sought;
3. that she was denied promotion or reappointment;
4. that in cases of reappointment (or tenure) others (*i. e.*, males) with similar qualifications achieved the rank or position.

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1. *See, e. g., Kunda v. Muhlenberg College*, 621 F.2d 532, 541—43 (3d Cir. 1980); *Whiting v. Jackson St. University*, 616 F.2d 116, 120—21 (5th Cir. 1980); *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1382–83 (5th Cir. 1980); *Sweeney v. Board of Trustees of Keene St. College*, 604 F.2d 106, 108 (1st Cir. 1979), *cert. denied* 444 U.S. 1045, 100 S.Ct. 733, 62 L.Ed.2d 731 (1980); *Davis v. Weidner*, 596 F.2d 726, 729–31 (7th Cir. 1979); *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154–56 (2d Cir.), *cert. denied* 439 U.S. 984, 99 S.Ct. 576, 58 L.Ed.2d 656 (1978).

632 F.2d at 340. We agree that these are the applicable elements in such cases.[2]

The test set forth above is not an exclusive one. Plaintiffs may under some circumstances establish a *prima facie* showing of unlawful discrimination in Title VII cases without satisfying the four specific elements of *McDonnell Douglas* or *Smith*. The Supreme Court has expressly rejected the argument that meeting the specific *McDonnell Douglas* requirements is the "only means" by which plaintiffs may make the requisite *prima facie* showing. *Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977). The key, the Court said, is simply that the "plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Id.* The Court subsequently explained that the plaintiff's initial burden is met where the plaintiff has shown that "it is more likely than not" that the employer's actions were based on unlawful considerations. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). Thus, in Title VII cases involving institutions of higher learning, plaintiffs may establish their *prima facie* case by a sufficient showing as to the four *Smith* elements or by offering other evidence which creates the inference that the complained of act was unlawful.

In *McDonnell Douglas*, the Court also established certain procedures governing the trial of Title VII cases. The "order and allocation of proof" are as follows: (1) the plaintiff must come forward with evidence sufficient to constitute a *prima facie* case

2. Although *Smith* like the case before us involves sex discrimination, and the four elements of plaintiff's *prima facie* case are here described in those terms, the same elements are applicable to claims of race discrimination in the academic context. Moreover, these elements are not applicable solely to claims relating to tenure, reappointment, or promotion, but with appropriate modifications, are also applicable to other Title VII claims involving faculty members, including initial hiring determinations.

of discrimination; (2) the defendant must then "articulate" a legitimate non-discriminatory reason for the adverse employment decision; and (3) the plaintiff must then be given the opportunity to show that the "assigned reason" was "a pretext or discriminatory in its application." *McDonnell Douglas,* 411 U.S. at 807, 93 S.Ct. at 1827.

The district court held, without discussing the four elements that establish a *prima facie* case under *McDonnell Douglas* and *Smith,* that Lynn failed to make the required showing. In the alternative, the district court held that the University "articulated legitimate and non-discriminatory reasons for not granting Lynn tenure." We assume, for purposes of our analysis, that the district court implicitly found that Lynn failed to show that the University's articulated reasons were "a pretext or discriminatory in [their] application."

[2-4] The district court clearly erred in concluding that Lynn failed to establish a *prima facie* case of discrimination based on sex. "The burden of establishing a *prima facie* case is not onerous." *Texas Dept. of Community Affairs v. Burdine,* .... U.S. ...., 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). Lynn obviously satisfied elements (1) and (3) of the *McDonnell Douglas* test as applied by Smith in the academic context. She also adduced sufficient evidence as to elements (2) and (4) to satisfy her initial burden. In addition to testimony and documentary evidence, Lynn submitted two types of statistical data; the first, which we refer to as "specific statistical data," tended to show that she met the objective criteria for tenure, and the second, which we refer to as "general statistical data," tended to show a general pattern of discrimination by the University in favor of men.

Lynn's specific statistical data, relating to the objective criteria for tenure, provided evidence that she had the same education, experienece and number of published works as others who had been granted tenure. For purposes of deciding whether Lynn has

established a *prima facie* case we find the specific statistical data submitted to be highly persuasive. It supports Lynn's contentions that she "was qualified for the position or rank sought," *i. e.*, element (2), and that "others (*i. e.*, males) with similar qualifications achieved the rank or position," *i. e.*, element (4).

The general statistical data submitted by Lynn, as mentioned, provides evidence of a pattern of academic sex discrimination by the University. The district court described the University's past practices as follows:

> Over the years University administrators have shown a lack of concern for the need for minority and female faculty members, and such indifference persists. Even though the University of California at Irvine maintains an Affirmative Action Program, statistical summaries still display an under utilization of these groups.

Later in its memorandum, the district court noted "since its founding, Irvine has granted tenure to 26 men and only two women—the last woman tenured was in 1972."

The Supreme Court has stated that general statistical data is helpful in individual employment discrimination cases. *McDonnell Douglas*, 411 U.S. at 805, 93 S.Ct. at 1825. It is particularly helpful in the academic context, where the tenure decision is highly subjective. *Cf. Rowe v. General Motors*, 457 F.2d 348 (5th Cir. 1972).[3] It is relevant despite the fact that the data may not

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3. Reliance on statistical proof at the *prima facie* case stage is not only practical, but also represents sound policy. The ultimate issue in a case like the one before us is whether the tenure decision was made on the basis of merit or on the basis of sex. Often, there is little direct evidence that plaintiffs can obtain when attempting to show that the decision was based on sex, *i. e.*, that there was discrimination in an individual hiring decision. Despite such problems of proof, Congress entrusted to the courts the responsibility of providing a forum for the litigation of claims of discrimination in universities and other institutions of higher learning. *Powell v. Syracuse University*, 580 F.2d 1150, 1154 (2d Cir. 1978); The Equal Employment Opportunity Act of 1972, 86 Stat. 103, sec. 3 (1972). Although statistical data does not provide direct evidence of discrimination in the individual hiring decision, use of such

be directly probative of any of the four specific elements set forth by *McDonnell Douglas* and *Smith*. Proof of a general pattern of sex discrimination is, in any event, evidence which tends to establish that it is "more likely than not" that a University's decision to deny tenure was based on sex, "a discriminatory criterion illegal under the Act." *See Furnco Construction Corp.*, 438 U.S. at 576, 98 S.Ct. at 2949 (*quoting Teamsters*, 431 U.S. at 358, 97 S.Ct. at 1866).

[5] In addition, testimony at trial revealed that the University's evaluation of Lynn's scholarship was due, in part, to its view that women's studies is not a substantial topic for scholarly work.[4] The district court stated:

> The criticism leveled at her work by scholars and administration officials appears to reflect their disdain of this [women's studies] as a topic of substance in a scholarly work. I find their lack of enthusiasm for her effort may stem from their belief that woman's [sic] studies was an unworthy topic to pursue.

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data is an effective method of proof, and, accordingly, an effective method by which to discharge our responsibility under Title VII. Moreover, its use has another substantial benefit. Statistical evidence does not deal with the merits of the university's tenure decision, which necessarily involves academic judgments. Its use thus allows us "to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior" proscribed by Title VII. *Powell*, 580 F.2d at 1154.

We do not suggest that avoiding a review of internal university processes is an overriding policy. To the contrary, by amending Title VII to cover educational institutions, Congress "evidenced particular concern for the problem of employment bias in an academic setting," *Powell*, 580 F.2d at 1154, and thereby made the decision that the broad societal interest in eliminating discrimination should be of overriding concern in Title VII cases in the academic context. We note only that the use of statistical data minimizes the possibility that courts will substitute their judgments for those of university personnel while providing courts with an effective tool with which to enforce Title VII.

4. Lynn's study of French literature concentrated heavily on women's issues, *e. g.*, the influence of women on the development of French literature.

The district court concluded, however, that the University's lack of enthusiasm towards women's studies was not evidence of discrimination because the University would have had the same objection if a man concentrated his studies on women's issues. We do not agree. A disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of a discriminatory attitude towards women.[5] The existence of a discriminatory attitude, like general statistical data, tends to establish that it is more likely than not that the University's decision was based on an impermissible criterion, and therefore tends to establish Lynn's *prima facie* case.

After consideration of both types of statistical proof, and the other evidence submitted at trial, we believe it is clear that the district court's finding that Lynn failed to satisfy her initial burden of establishing a *prima facie* case was erroneous.

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5. While we might not have made the statement in the text which accompanies this note a number of years ago, today its truth seems self-evident. The history of our nation reflects the evolution of our understanding of the nature of man (in the generic sense of the word) and the legitimate aspirations and rights of the individual. Attitudes which seemed benign at one time are now understood to be discriminatory. *Compare Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) *with Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). The beliefs that women should not have the right to vote, practice law, or serve on the United States Supreme Court, were once reflective of the majority view, and the law. We now understand, somewhat belatedly, that these concepts reflect a discriminatory attitude. Today any person is free to hold to such concepts, but such concepts may not serve as the basis for job-related decisions in employment covered by Title VII. Other concepts reflect a discriminatory attitude more subtly; the subtlety does not, however, make the impact less significant or less unlawful. It serves only to make the courts' task of scrutinizing attitudes and motivation, in order to determine the true reason for employment decisions, more exacting. We are sensitive to the problems related to judicial examination of issues like the importance of women's studies, and to the need for courts to refrain from substituting their judgment for that of educators in areas affecting the content of curricula. Accordingly, the view we express is a narrow one. We are saying only what Title VII commands: when plaintiffs establish that decisions regarding academic employment are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such discriminatory attitudes, however subtly, courts are obligated to afford the relief provided by Title VII.

Next, we turn to whether the University "articulated" reasons for its denials of merit salary increases and of tenure. The University argues that its denials were based on deficiencies in Lynn's scholarship.

A *prima facie* case "raises an inference of discrimination." *Furnco Construction Corp.*, 438 U.S. at 577, 98 S.Ct. at 2949. "To dispel the adverse inference from a *prima facie* showing under *McDonnell Douglas*, the employer need only 'articulate some legitimate, non-discriminatory reason for the employee's rejection.' " *Id.* at 578, 98 S.Ct. at 2950, *quoting McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. The Court, in *Board of Trustee's of Keene St. Col. v. Sweeney*, 439 U.S. 24, 25, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978), made it clear that the burden of "articulating some legitimate, non-discriminatory reason" is significantly less than proving the absence of discriminatory motive.[6] Accordingly, the court held in *Burdine* that the defendant-employer need not prove by a preponderance of the evidence that the plaintiff was rejected for a legitimate, nondiscriminatory reason, and the court there stated that "[i]t is sufficient if the defendant's *evidence* raises a genuine issue of fact as to whether it discriminated against the plaintiff." 101 S.Ct. at 1094 (emphasis added) (footnote omitted).[7]

[6] The evidence offered by the University shows that throughout Lynn's career she was warned that her scholarship was suspect. As mentioned earlier, she was given the opportunity to discuss her problems with members of her department, and

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6. The Court reasoned that if employers were required to prove the absence of discriminatory motive, the third stage of the *McDonnell Douglas* analysis would be superfluous, "since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring contrary proof from the employee as a part of the third step." *Board of Trustees of Keene St. Col. v. Sweeney*, 439 U.S. at 24 n.1, 99 S.Ct. at 295 n.1.

7. Although prior decisions had spoken only of "articulating" a reason, *Burdine* makes it clear that the defendant must produce some evidence to rebut the plaintiff's case. 101 S.Ct. at 1094.

after her mid-career review, she was granted sabbatical leave for the explicit purpose of improving her research and writing skills. It was Lynn's deficient scholarship that the tenure review committee claims was the basis of its decision not to recommend merit increases or tenure. Without doubt, deficient scholarship is a legitimate, nondiscriminatory reason to deny salary increases or tenure. In view of the standard set forth in *McDonnell Douglas*, *Sweeney* and *Burdine*, and the relative ease with which the courts of appeals have found the employer's burden to be satisfied in the academic context, *see, e.g., Smith v. University of North Carolina*, 632 F.2d 316, we agree that the University successfully "articulated" reasons that justify its actions, *i. e.*, it offered evidence supporting its reasons for denying Lynn tenure.

[7] Under some views of the *McDonnell Douglas* analytical process, the University's articulated reason and supporting evidence might be considered at step one of that process, *i. e.*, in connection with plaintiff's *prima facie* showing that she possesses the requisite qualifications for tenure. *See Leiberman v. Gant*, 630 F.2d 60, 64 (2d Cir. 1980). We think it preferable, however, to consider the University's arguments at steps two and three. In our view, objective job qualifications are best treated at step one and subjective criteria, along with any supporting evidence, are best treated at the later stages of the process. To do otherwise would in many instances collapse the three step analysis into a single initial step at which all issues would be resolved. This would defeat the purpose underlying the *McDonnell Douglas* process. *See Sweeney*, 439 U.S. at 24 n.1, 99 S.Ct. at 295 n.1. In addition, addressing the University's arguments at the first step of the analysis would increase the possibility that courts will be required to engage in evaluations of the performance of faculty members, a task to which others are better suited.[8]

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8. The qualifications that are most appropriately considered at step one are those to which objective criteria can be applied, such as level of education, years of teaching experience, in general and at the

[8, 9] From a practical standpoint, and despite our determination that evidence of the nature here involved should be considered in connection with steps two and three rather than step one, it should make little difference to the outcome which way the evidence is analyzed. If evidence relating to subjective criteria is treated as relevant to step one, the plaintiff would be entitled, in connection with that aspect of the case, to show that the alleged criteria are inherently discriminatory or discriminatorily applied, or to show that notwithstanding the University's contention, she meets the criteria. If offered by the University to meet its step two burden, the plaintiff must attempt to show that the reason offered is not the real explanation for the University's decision, but is merely an excuse for a discriminatory act. While it is true that the University need offer little evidence in support of its articulated reason in order to require plaintiff to proceed to step three, the more substantial the University's evidence the more persuasive plaintiff's step three evidence must be in order to establish that the articulated reason is pretextual or was discriminatorily applied. Regardless of the stage at which we consider evidence of the nature here involved, the plaintiff's ultimate burden remains the same, to show by a preponderance of the evidence that the University's action was based on unlawful discriminatory conduct.[9]

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particular institution, and the publication of scholarly materials. Where the basic objective criteria are not met, plaintiff has failed to establish a *prima facie* case. However, in some instances a showing of specific or general discriminatory conduct by a university through statistical or other evidence will be sufficient to raise doubts as to whether objective criteria are applied in a non-discriminatory manner. In those instances dismissal would not be proper, even though plaintiff has failed to show he has met the "objective criteria."

9. We should note that when evidence that supports the University's articulated reason is introduced during the plaintiff's presentation of his case, the plaintiff is required to counter such evidence and offer his proof as to pretext before resting. *See Correa v. Nampa School Dist. No. 131*, 645 F.2d 814 (9th Cir. 1981).

Since, as we concluded *ante*, the district court properly found that the University "articulated [a] legitimate, non-discriminatory reason," we would ordinarily next determine if the reason "articulated" by the University was "a pretext or discriminatory in its application." However, we do not decide that issue here.

[10] Throughout the proceedings below, Lynn was denied access to her tenure review file. The materials contained in the file were those upon which the tenure review committee claims that it based its denial of tenure, and, as such, are highly relevant to the issues in this case. At the discovery stage, when Lynn requested that the University produce the file, the district court issued a protective order. At trial, the University submitted the file to the court; the court reviewed it *in camera* but refused to disclose the contents of the file to Lynn. Lynn asserts that the file was submitted by the University, and used by the district court, as evidence, rather than for the purpose of determining whether the contents of the file were privileged.[10] Thus, Lynn contends that the refusal to disclose the contents of the file violated due process. We agree.[11]

During direct examination of Lynn, her attorney offered the minority report of the tenure review committee as evidence. In response, the following statements were made:

> MS. HELWICK (attorney for the University): The problem, your Honor, is that obviously, if this is admitted into evidence then we have a problem by way of a response, and then we get into the whole scholarly debate of the quality of Dr. Lynn's scholarship . . .

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10. Lynn's principal contention before this court, that she was entitled to access to the file and that the denial of access prevented her from having an adequate opportunity to prove discrimination within the meaning of Title VII, is discussed, *post*. *See* text accompanying note 12, *et seq.*

11. The University does not contend that it would be proper for the district court to have accepted and used the file as evidence without disclosure to Lynn. Rather, the University argues that the file was neither submitted, accepted nor used as evidence.

THE COURT: I think I have to permit it to come in, even though it may place you in the position of having to counterbalance it. It is sort of like the position the government is put in when it wants to prosecute a person for some type of intrusion into government records, and in order to do it must bring forth those records . . .

MS. HELWICK: . . . and I think that by submitting this document we will necessarily have to further violate the confidentiality of those same extramural scholars.

THE COURT: Is it possible for you to meet this by showing content of the majority report but not authorship?

MS. HELWICK: I think not, . . .

THE COURT: Why can't it be submitted, then for *in camera* inspection of the Court and not of the plaintiff.

MS. HELWICK: I have no objection to an *in camera* review by your Honor of the entire tenure review file, if you deem that appropriate.

The minority report was then admitted into evidence.

Later in the trial, the University presented the district court with the tenure review file for *in camera* inspection:

MR. LUNDBERG (attorney for the University): . . . And you have a portion of that which has been admitted as Exhibit 23 [the minority report]. But there is material you do not have, and we feel for purposes of your making a complete review that you ought to be provided with the file that was before the ad hoc review committee. This is what we propose to provide you.

THE COURT: All right.[12]

The record leaves little doubt that the University submitted the tenure review file to counterbalance the effect of the minority

12. Counsel for plaintiff repeatedly requested the right to see the file. When counsel for the University offered the file (three folders) to the court, saying "I would now submit them to the court, your Honor," plaintiff's counsel objected. In fact, she objected to even an inspection of the file by the court for the reason that plaintiff had not been allowed to see it.

report and that the district court acceded to this use of the file.

The receipt and review by the district court of the tenure review file for the purpose of assisting it to make factual determinations or to evaluate other evidence violated principles of due process upon which our judicial system depends to resolve disputes fairly and accurately. The system functions properly and leads to fair and accurate resolutions, only when vigorous and informed argument is possible. Such argument is not possible, however, without disclosure to the parties of the evidence submitted to the court. Thus, the district court's receipt and review of the file, without disclosure of its contents to Lynn, requires reversal of the order of the district court.

In view of our holding, we need not decide the question whether tenure review files, and more particularly peer evaluations, are privileged in academic Title VII cases generally. We do wish, however, to provide the district court with some guidance on the question since that court will be required, once again, to consider the issue of Lynn's right to obtain her tenure review file, upon remand.[13]

[11] When determining whether tenure review files, including peer evaluations, are privileged, courts have balanced the university's interest in confidentiality, *i. e.*, in maintaining the effectiveness of its tenure review process, and the need which Title VII plaintiffs have for obtaining per evaluations in their

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13. While the remainder of our discussion is confined to future use of the tenure review file, we also note for the district court's benefit upon remand, that some of the evidence previously discussed in connection with plaintiff's *prima facie* case is also relevant with respect to her efforts to establish that the University's articulated reason was "a pretext or discriminatory in its application." Evidence is not necessarily submitted solely to establish a *prima facie* case or to show pretext or discriminatory application; it may be used, when relevant, to establish either of plaintiff's steps in the *McDonnell Douglas* process or both. For example, general statistical data is relevant to a showing of discriminatory application, and thus may be used at the third step in the *McDonnell Douglas* process, *McDonnell Douglas*, 411 U.S. at 805, 93 S.Ct. at 1825, as well as at the *prima facie* step.

efforts to prove discriminatory conduct. *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1384-85 (5th Cir. 1980); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.), *cert. denied* 434 U.S. 904, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977). In making that determination it is necessary to consider the importance of enabling plaintiffs to prove that discriminatory conduct has occurred, the difficulty of obtaining direct proof of discriminatory motivation and the strong national policy against discrimination in educational employment.

The Fourth Circuit has suggested, *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, and the Fifth Circuit has held, *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, that when evaluations serve as the alleged basis for the University's decision to deny tenure or promotion, the plaintiff's interest in proving his case outweighs the University's interest in protecting the confidentiality of a file and that in such cases the evaluations must be provided to the plaintiff. In *Keyes*, the Fourth Circuit denied plaintiff's request for all peer evaluations for the entire faculty of the College. The court noted, however, that "if the College had sought to justify any male-female disparity on the basis of these evaluations the plaintiff should have been granted the opportunity to use them" to prove her case. 552 F.2d at 581.[14] The Fifth Circuit, in *Jepsen*, found the reasoning in *Keyes* to be "persuasive," and held

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14. *Keyes* was a class action suit brought by a class plaintiff on behalf of the female faculty of Lenoir Rhyne College. The class plaintiff alleged sex discrimination in salaries and promotions. To show that the College's explanations for variances in salaries and promotions were pretextual, she requested, *inter alia*, peer evaluations for all members of the College faculty. It was in this context that the Fourth Circuit held that the evaluations need not be disclosed.

Keyes, the class plaintiff, also had an individual complaint against the College. She alleged that the College's decision to deny her request for an extension of tenure was made on the basis of sex. The College claimed that its denial was based solely on the fact that she was too old. The Fourth Circuit did not address the question of whether Keyes was entitled to her own evaluations. Nor did the Fourth Circuit reveal whether she in fact received those evaluations.

that where "the university defends a claim of discrimination on the ground that promotional decisions were based solely on unbiased faculty evaluations which involved criteria unrelated to sex," a plaintiff is entitled to obtain the evaluations. 610 F.2d at 1384.[15]

[12] The University claims that Lynn was denied tenure because of deficient scholarship. Since its view of Lynn's ability is based, in large part, on the content of the tenure review file, including peer evaluations, the University is defending, in essence, on the ground that its tenure decision with respect to Lynn was based on non-discriminatory peer evaluations. Under *Jepsen* and *Keyes*, disclosure of the evaluations would be required. We agree fully with the views expressed by the Fourth and Fifth Circuits in that respect. However, in Lynn's case it is not necessary to rely on the right of academic plaintiffs generally to obtain evaluations when a university has used the documents in reaching its decision. The record before us reveals that the University has far less interest in the confidentiality of Lynn's tenure review file than in the ordinary case in which disputes over such files arise.[16]

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15. We believe the word "solely" was used for the purpose of reflecting accurately the use that the University actually made of the files in the case before the court. We do not believe the Fifth Circuit intended to limit its ruling to cases in which the university considered only faculty evaluations and to exclude from the operation of its rule cases in which the university considered other materials as well as faculty evaluations. We understand the rule which the court set forth to mean that the plaintiff must be permitted to obtain evaluations whenever the university's decision is based on them, in whole or in part.

16. Whether or not a university may adopt procedures which provide for full disclosure of the contents of the evaluations but protect the identities of individual evaluators is a question which we need not determine here. However, in this connection we note a decision of the Fifth Circuit which was decided after we issued our initial opinion. In *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981), the court held that when a plaintiff contends that she was denied promotion on the basis of sex discrimination, a professor who participated in the tenure review process may be compelled to testify as to how he voted and his reasons therefor. The court said:

Lynn received summaries of the comments of her evaluators, as do all University academic personnel when they so request.[17] Unlike the ordinary plaintiff, however, Lynn knew the names of her evaluators due to the fact that Dr. Nicole Marzac, apparently in violation of the University rule, provided her with a copy of the minority report.[18] Moreover, Marzac provided Lynn with copies of letters written by Marzac to Chancellor Aldrich and to Professor Stephen, as well as the minutes of the meeting of the tenure review committee.[19] The final pieces of information under-

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No one compelled Professor Dinnan to take part in the tenure decision process. Persons occuping positions of responsibility, like Dinnan, often must make difficult decisions. The consequence of such responsibility is that occasionally the decision-maker will be called upon to explain his actions. In such a case, he must have the courage to stand up and publicly account for his decision. If that means that a few weak-willed individuals will be deterred from serving in positions of public trust, so be it; society is better off without their services. If the decision-maker has acted for legitimate reasons, he has nothing to fear. We find nothing heroic or noble about the appellant's position; we see only an attempt to avoid responsibility for his actions. If the appellant was unwilling to accept responsibility for his actions, he should never have taken part in the tenure decision-making process. However, once he accepted such a role of public trust, he subjected himself to explaining to the public and any affected individual his decisions and the reasons behind them.

At 432.

17. University of California Rule 195–20, entitled "Access to Academic Personnel Records," protects individuals' rights to privacy and sets forth when, and to whom, academic records may be disclosed. The rule provides that an individual may inspect all documents except "confidential documents." Those deemed confidential are: (a) letters of evaluation submitted in confidence, (b) letters from the chairperson setting forth a departmental recommendation regarding appointment, promotion, merit increases, appraisal, reappointment, nonreappointment, or terminal appointment, or (c) reports, recommendations from ad hoc and standing committees. Rule 195–20b.(1). The rule also provides that an individual has the right to oral or written summaries of "confidential documents." Rule 195–20b.(2).

18. Dr. Marzac authored the minority report. The minority report represents the views of those who disagreed with the committee's recommendation that tenure be denied.

19. The letters and the minutes were subject to the confidentiality rule of the University and were not to be disclosed.

mining the confidentiality of the file were provided, at trial, by Professor Slim, chairman of the tenure review committee. Professor Slim was cross-examined on the proceedings that were conducted by the tenure review committee, and on the majority report. His testimony provided Lynn with further knowledge as to the personal views of the committee members.

Although it cannot be determined with certainty which members of the committee, or evaluators, made which comments, the documentary evidence in Lynn's possession, in addition to Marzac's description of that evidence in her deposition filed with the district court and Slim's testimony at the trial make it possible to attribute specific views and attitudes to specific evaluators. Accordingly, the confidentiality of Lynn's file has been substantially diminished as a result of the information already in her possession.

The district court's determination as to whether and when Lynn may have access to her tenure review file for purposes related to a new trial should be reached in light of the strong interest which Lynn continues to have in determining whether the contents of the file will assist her in proving her case (and particularly in establishing that the University's articulated reason for denial of tenure was "a pretext or discriminatory in its application"), and the minimal interest that the University now has in preserving the vestiges of confidentiality in the file.[20]

The order of the district court is reversed and remanded for proceedings consistent with this opinion.

ALARCON, Circuit Judge, concurring.

I concur in the opinion of the court insofar as it appears to hold that the district court may have violated Lynn's right to due process by admitting the contents of the tenure review file into

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20. Without suggesting that an *in camera* review would ever be appropriate in determining a plaintiff's entitlement to a tenure review file, we note that, upon remand, the district court should determine any questions relating to Lynn's right to obtain her tenure review file without considering the nature of its contents or making any *in camera* review thereof.

evidence "for the purpose of assisting it in making factual determinations or to evaluate other evidence" (slip opinion p. 4751) after denying Lynn's request to examine these records because they contain privileged and confidential matter.

The balance of the court's opinion is obiter dictum which is not only unnecessary to the disposition of this matter, but fails to give due consideration to the problems which will flow from a requirement that the confidentiality of peer review evaluation must be breached in every case in which a teacher's ability is based, in large part, on the content of the peer review file, without regard to protection of the privacy of the commentators.

I would exercise judicial restraint and leave to another day the consideration of these seductive issues, when the questions are squarely before this court on a record which is otherwise free of reversible error.

Appendix C

Filed Dec. 28, 1981
Clerk, U.S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

No. 79-3384

THERESE BALLET LYNN, and all others similarly situated,

Plaintiffs-Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant-Appellee.

ORDER

Before: ALARCON, FERGUSON, and REINHARDT, Circuit Judges:

It is ordered that footnote 16, as set forth in the Amended Opinion filed on December 18, 1981, be amended to read as follows:

> Whether or not a university may adopt procedures which provide for full disclosure of the contents of the evaluations but protect the identities of individual evaluators is a question which we need not determine here. *But, compare In re Dinnan,* Nos. 80-7432, 80-7441 (5th Cir.* 11/16/81) *with Gray v. Board of Higher Education,* 50 U.S.L.W. 2307 (S.D.N.Y., Nov. 9, 1981).

The motion of Oliver A. Johnson and Harold W. Horowitz for leave to file brief as amici curiae is granted.

The motion of the Board of Trustees of the Leland Stanford Junior University for leave to file briefs as amicus curiae is denied. Judge Alarcon would grant this motion.

The petitions for rehearing are denied. Judge Alarcon would grant the petitions for rehearing.

The full court has been advised of the suggestion for rehearing en banc, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. F. R. App. P. 35(b). The suggestion for rehearing en banc is rejected.

Filed Jan. 14, 1982
Clerk, U.S. Court of Appeals

Appendix D

United States Court of Appeals
for the Ninth Circuit

No. 79-3384
D.C. No. CV 77-1716-DWW

THERESE BALLET LYNN, and all others similarly situated,

Plaintiffs-Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant-Appellee.

ORDER

Before: ALARCON, FERGUSON, and REINHARDT, Circuit Judges:

Appellee's petition for rehearing was denied by the panel. At that time the panel added a footnote to its opinion and Judge Alarcon filed a concurring opinion. Thereafter, appellee's first request for rehearing en banc was circulated to the active judges of the court and no active judge having requested a vote thereon the request was rejected. However, the added footnote was amended. The mandate inadvertently was not issued in a timely manner and appellee subsequently filed a second petition for rehearing and request for rehearing en banc, in substance re-arguing the points set forth in its first petition. The mandate then issued.

The second petition for rehearing and request for rehearing en banc being substantially the same as the first, and being filed belatedly, is treated as a request to recall the mandate. That request is denied.

Judge Alarcon would grant the request to recall the mandate.

Appendix E

Central District of California
No. CV 77-4736-DWW
May 1, 1979

United States District Court
for the Central District of California

THERESE BALLET LYNN,

Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Defendant.

Counsel:

John G. Sobieski, Lada Marx, Los Angeles, California for Plaintiff.

Donald L. Reidhaar, John F. Lundberg, Christine Helwick, Kate K. Alderman, Berkeley, California, for Defendant.

WILLIAMS, D. J.: Plaintiff is a female native of France who was employed as an assistant professor of French by the University of California at Irvine until June 30, 1977. That date marked the end of her one-year terminal contract granted on June 30, 1976, after she had been denied tenure. Plaintiff filed charges with the Equal Employment Opportunities Commission but conciliation efforts were unsuccessful and for the purposes of this action, it is conceded that plaintiff has complied with the procedural requirements of 42 USC § 2000e-5(f). This Court has jurisdiction over this matter pursuant to Title VII of the Civil Rights Act of 1964 as amended. It is not disputed that the University of California was made subject to the provisions of Title VII on and after March 24, 1972.

Lynn became a citizen of the United States and gained a portion of her education in this country and had prior teaching experience at the University of Tennessee and at Knoxville College. She was awarded a Ph.D. degree by the University of Illinois

in 1971. She has published several scholarly papers and one book in her field. Commencing July 1, 1969, Lynn was appointed a lecturer at U.C. Irvine and served as such until July 1, 1971 when she was appointed assistant professor Step I. In 1974 she advanced to assistant professor Step II where she served until her termination. In this action she contends that the defendant refused her tenure and terminated her employment as a consequence of its policy of discrimination toward women and persons of foreign origin. Lynn contends that at the time of her hiring, she was appointed to a step lower than that given to a less qualified male and that she was subjected to allegedly unfavorable work conditions such as (a) heavy assignment of composition courses rather than literature courses; (b) heavy assignment of Monday, Wednesday and Friday classes; and (c) a light assignment of desired graduate courses. Plaintiff testified that the teaching of composition courses requires more preparation by the instructor and is less challenging than the teaching of literature courses; that the requirement that she teach Monday, Wednesday and Friday courses rather than on other days of the week reduces the time she would have on weekends to pursue research and that the denial to her of the privilege of teaching graduate seminars lessens her ability to broadly develop her teaching skills and diminishes the prestige she would otherwise have before students.

In answer to this, the university maintains that it had no intention of acting discriminatorily in assigning composition courses to plaintiff; that it felt that an instructor who was a native of France could more effectively teach the language and inject a truer cultural communication than could a person born in this country; that the plaintiff had never before the filing of this action complained to the administration of the days in the week that she was scheduled to teach and that in fact, the scheduling had been her choice.

Over the years university administrators have shown a lack of concern for the need for minority and female faculty members, and such indifference persists. Even though the University of California at Irvine maintains an Affirmative Action Program, statistical summaries still display an underutilization of these groups. The instant case requires careful scrutiny, since it is easy for a university administration, while maintaining an outward posture of equal opportunity, to decline to hire or promote members of minorities or females on the pretext that those eventually given positions were the best-qualified.

The university denies in this instance that the eventual termination of Lynn was the result of discrimination on its part and alleges that during the years of her employment it had obtained extra mural critiques of her writings by objective scholars several of whom, claimed that she lagged in self-development; and that her research and scholarship were not sophisticated and was characterized by her strong feminist attitudes. Scholars who reviewed her work criticized the quality of her scholarship because they detected a "trendy" flavor in the themes she tried to develop; they describe it as "popularization."

Lynn's field of studies is Medieval French Literature. Her research seems to be heavily influenced by her concern with the role of women. The criticism leveled at her work by scholars and administration officials appears to reflect their disdain of this as a topic of substance in a scholarly work. I find that their lack of enthusiasm for her efforts may stem from their belief that women's studies was an unworthy topic for Lynn to pursue. However, this complaint could be lodged against a male professor who felt moved to develop the topic. An individual's topic of study is not on the list of items that 42 U.S.C. 2000e-2 proscribes discrimination concerning. For this court to say to a university "you cannot deny tenure on the grounds that you do not like the scholar's subject of study" is the equivalent of ordering that the tenure

committee must exercise its professional scholarly judgment in a particular way. This gets very near a First Amendment problem. Free exercise of scholarly judgment is a part of academic freedom. *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967); *University of California Regents v. Bakke*, [17 EPD ¶ 8402] 57 L.Ed. 750, 785 (1978).

Plaintiff's statistics claim that since its founding, Irvine has granted tenure in the School of Humanities to 26 men and only 3 women—the last woman tenured was in 1972.

The professional career of Professor Lynn at Irvine was characterized by numerous "warnings" to her that her scholarship was less than outstanding. Periodically since 1972 Mrs. Lynn underwent reviews of her work, some by extra mural evaluators jointly selected by Lynn and the administration. At one point Lynn was given sabbatical leave for the purpose of permitting her time to strengthen her research efforts so she would improve her chances of gaining the approval of her review board. Finally the department recommended denial of tenure to her and this was sustained by the Dean of the school. Then in 1976 the Chancellor notified her of the rejection. That marked the first time Lynn complained of sex discrimination.

I have reviewed the evidence in this case in a most painstaking manner and cannot conclude that plaintiff has borne her burden of proving that her dismissal was the product of sex discrimination or discrimination because of her place of origin. There is absolutely no credible evidence to support the latter. There are some reasonable inferences which might support the former, but these melt into insignificance when weighed against the reasons defendant gives for the termination. Throughout all this assessment of the evidence, I have been mindful of the pretexts some employers use to discriminate against minorities. But here, the university seems to have made a good faith determination of

reasons for denying Lynn tenure, not colored by a desire to refuse this employment security because Lynn was female.

While being conscious of the duty of the trier of fact to carefully sift the evidence for solid inferences of discrimination, I am also mindful of the ever-present danger that a judge in a Title VII case might too easily be tempted to substitute his judgment for the reason for a termination, over the considered judgment of scholars who are learned in the very field of endeavor that the applicant for tenure claims expertise.

A fair conclusion compels a finding that Lynn was not given disparate treatment in teaching assignments or work conditions, and that the decision to deny her tenure was based only upon a composite academic conclusion that the quality of her scholarship had slipped to a level not acceptable to meet the stringent demands of the university.

Judgment is ordered for the defendant. Defendant is directed to prepare proposed findings of fact and conclusions of law and a form of judgment by May 15, 1979.

Appendix F

Clerk, Central District of California
Filed May 30, 1979

United States District Court
for the Central District of California

No. CV 77-4736 DWW

THERESE BALLET LYNN, and all other persons similarly situated,

Plaintiffs,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant.

FINDINGS OF FACT

1. Plaintiff is a naturalized citizen and a native of France. She was employed by defendant as a Lecturer in the French and Italian Department on the University of California, Irvine campus beginning September 1969, for two successive academic years. In July, 1971, after receipt of her Ph.D., plaintiff was appointed as an Assistant Professor Step I, off-step at a salary of an Assistant Professor Step III. In July of 1974 plaintiff was promoted to Assistant Professor Step II with an off-step salary of Assistant Professor Step III. Plaintiff was employed pursuant to two year contracts until June 30, 1976, when plaintiff was offered and accepted a one year terminal appointment. The contracts of employment as an Assistant Professor did not provide for continuity of employment.

2. Defendant, The Regents of the University of California (hereafter University) is a corporation duly organized and existing under and by virtue of article IX, section 9 of the California Constitution. It is authorized and empowered by that section of the California Constitution to administer a public trust known as the University of California, of which the University of California, Irvine is one campus.

3. Plaintiff's action is based upon the Civil Rights Act of 1964, Title VII, as amended, 42 United States Code section 2000e, et seq. Plaintiff claims that defendant discriminated against plaintiff on the basis of sex and French national origin. Plaintiff seeks reinstatement to a tenured position, back pay, broad remedial injunctive relief, and attorney's fees.

4. Defendant maintains a tenure system for certain academic positions, including that occupied by plaintiff, requiring that tenure be obtained within eight years, or that such employment be terminated. Prior to tenure review other academic reviews, including a merit salary review or reviews and a mid-career review are conducted. Both forms of review were conducted during plaintiff's employment. In both the 1972-73 and the 1973-74 academic year plaintiff was reviewed by the University internally, and by separate sets of extramural evaluators. After each review plaintiff was warned that her research was deficient.

5. During the 1972-73 review the Department of French and Italian recommended an accelerated merit salary increase for plaintiff from Assistant Professor Step I to Assistant Professor Step III; however, extramural evaluators, one selected by plaintiff and one selected by the University, judged plaintiff's scholarly work to be poor. In January of 1973 the Budget Committee of the Academic Senate, or as it came to be known the Academic Personnel Committee, requested further review; further review was conducted internally. The Academic Senate is an academic peer governing body, the Budget Committee being one of the standing committees which has jurisdiction, amongst other matters, over academic promotions. Accelerated promotion was denied by the Budget Committee after review.

6. A mid-career review was conducted during the 1973-74 academic year. New extramural evaluators were selected and reviewed plaintiff's scholarly work. After the mid-career review was conducted, plaintiff was warned that the quality of her

scholarly research was considered below standards of the University of California. She requested and spoke to various members of the Department of French and Italian regarding the deficiencies in her scholarly work.

7. During plaintiff's employment, she received letters from the Department Chairman indicating the conditions under which plaintiff was employed, namely, that she was employed on a two-year contract which would terminate of its own force and that she was subject to tenure review pursuant to rules of the Academic Personnel Manual of the University of California. Those rules were attached to the letters provided plaintiff, and were otherwise available to her in the offices of the Department of French and Italian. At the time of initial employment plaintiff received a copy of the Faculty Handbook, May, 1968 which described terms and conditions of academic employment, including the tenure system.

8. During the Fall of 1974 and the Winter of 1975 plaintiff was given sabbatical leave for the explicit purpose of improving her scholarly research.

9. The University has a tenure review system for promotion in which the excellence of a candidate's research, teaching, University and public service are judged. In order to receive candid evaluations from peers the reports of the various levels of review are confidential, as are the identities of an ad hoc review committee and the identities of extramural evaluators selected by the University. There are five levels of review in the tenure review process; each is independent of the other. The levels of review include that of the individual department of which the tenure candidate is a member, the dean of the school of which the department is a part, an ad hoc committee review, a review by the Budget Committee of the Academic Senate, review by the Office of Academic Affairs, and finally, review and decision by the Chancellor of the University of California, Irvine.

10. Plaintiff's tenure review was postponed for one year in order to provide plaintiff ample time to improve her research. During the Spring of 1975, the Chairman of the Department of French and Italian notified plaintiff that in the following year tenure review would be conducted. Plaintiff was asked for the names of extramural scholars to review plaintiff's scholarly work and other documentary evidence with regard to promotion to tenure. Each scholar named by plaintiff was contacted. The Chairman of the Department of French and Italian also contacted other extramural scholars for the purpose of having them review plaintiff's scholarly work, as well as, other documentary evidence for promotion to tenure. Her work was favorably commented upon by a majority of these scholars. Plaintiff reviewed and approved the index and non-confidential material contained in the academic review file; the review and approval were for purposes of completeness and accuracy. The Department of French and Italian conducted two meetings with regard to plaintiff's tenure review; junior faculty and graduate students were consulted. The majority recommendation of the tenured members of the Department was that tenure be denied. The Dean of the School of Humanities also recommended denial of tenure. An ad hoc review committee consisting of two medieval scholars, one medievalist in English literature, a member of the Irvine faculty and a student was formed. The majority view of the ad hoc review committee was that tenure ought to be denied. At each subsequent level of review, including Budget Committee review and review by the Office of the Vice Chancellor of Academic Affairs, the recommendation was for denial of tenure. Finally, the Chancellor denied tenure to plaintiff.

11. Tenure was denied and plaintiff informed by letter from the Chancellor dated June 28, 1976, and offering plaintiff a terminal year appointment from July 1, 1976 through June 30, 1977.

12. The review of plaintiff to tenure was in accordance with the applicable rules of the Academic Personnel Manual.

13. Plaintiff requested reconsideration of the decision to deny tenure, and on the basis of evidence presented, the Budget Committee denied such reconsideration.

14. On March 3, 1976, plaintiff submitted a five page written complaint to the Committee on Privilege and Tenure claiming discrimination and harassment in her employment on the University of California, Irvine campus.

15. The Committee on Privilege and Tenure is a committee of peers constituted by the Academic Senate of the Irvine campus. It has jurisdiction to make investigations, and in its discretion, to hold hearings on any matter relating to personal, departmental, or University welfare.

16. The Committee on Privilege and Tenure conducted an investigation and found neither discrimination nor harassment of plaintiff.

17. Plaintiff made further complaint to a Committee on Privilege and Tenure subsequent to her original complaint, and the second Committee found no reasons to reopen the investigation.

18. Although plaintiff complained that part of the disparate treatment of her was assignment to Monday, Wednesday and Friday classes, her own testimony was that she did not request relief from the schedules prepared by Department Chairman.

19. Although the plaintiff complained about having to teach an inordinate number of composition courses, and although plaintiff testified that teaching such courses requires more preparation and is less challenging than the teaching of literature courses, it was felt that as a native of France plaintiff could more effectively teach the language courses and provide a more enriching cultural experience for students.

20. Although plaintiff complained that she did not teach enough graduate seminars, plaintiff taught the exact same number

of graduate seminars during the years that she was employed as did the male that plaintiff compared herself with, and taught one more graduate seminar than the male who was Department Chairman during the longest period of time plaintiff was employed by the University of California, Irvine.

21. During her employment plaintiff was warned numerous times that her scholarship was less than outstanding.

22. Plaintiff was not treated disparately in teaching assignments or working conditions; she was denied tenure based upon the composite academic conclusion that the quality of her scholarship was at a level not acceptable to the stringent demands of the University.

CONCLUSIONS OF LAW

1. The court has jurisdiction over this matter pursuant to Title VII of the Civil Rights Act of 1964, as amended. Title VII became applicable to defendant on March 24, 1972.

2. Plaintiff has complied with the procedural requirements of 42 United States Code section 2000e-5(f).

3. Plaintiff has failed by the weight of evidence to make out a prima facie case of discrimination on the basis of sex and national origin resulting in her failure to obtain tenure in the Department of French and Italian at the University of California, Irvine. Specifically, plaintiff has failed to make out a prima facie case under the Civil Rights Act of 1964, as amended, Title VII, 42 United States Code section 2000e, et seq.

4. Even though the plaintiff has failed to make out a prima facie case, defendants have articulated legitimate and nondiscriminatory reasons for not granting plaintiff tenure on the University of California, Irvine campus.

5. The complaint should be dismissed in its entirety and judgment should be entered in favor of defendant and against plaintiff.

Appendix G

Central District of California
May 30, 1979

United States District Court
for the Central District of California

No. CV 77-4736-DWW

THERESE BALLET LYNN, and all other persons similarly situated,

Plaintiffs,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant.

JUDGMENT

WILLIAMS, D. J.: This action came on regularly for trial on Monday, May 19, 1979. Lada S. Marx and John G. Sobieski appearing for plaintiff, Therese B. Lynn, and John F. Lundberg and Christine Helwick appearing for defendant, The Regents of the University of California. Evidence, both oral and documentary, having been presented, the cause having been argued and submitted for decision and the Court having caused to be made and filed herein its written Findings of Fact and Conclusions of Law.

IT IS ORDERED, ADJUDGED, AND DECREED that defendant have judgment, plaintiff's complaint be dismissed, and that defendant recover from plaintiff its costs of suit herein.

Opposition

Office - Supreme Court, U.S.
FILED
JUL 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1962

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

VS.

THERESE BALLET LYNN,
Respondent.

Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATUTES

Civil Rights Act of 1964, Title VII (42 USC § 2000e et seq.) 2, 4, 5, 6, 9, 10, 11, 12

STATEMENT OF POSITION

Respondent, Therese Ballet Lynn's (Lynn's) position is as follows:

1. Lynn agrees with the University of California's (the University's) position that the Court of Appeals' decision (656 F2d 1337) decided important questions of Title VII law which have not been, but which should be, settled by this Court.

2. The Court of Appeals' decision, (a) erred in not holding that, on retrial, Lynn is entitled to access to *all* the University's records relating to its denial of tenure to Lynn; (when a University defends a charge of unlawful employment discrimination by a claim that its actions were based on its review, which concluded that the Title VII plaintiff's scholarship was inadequate, the Title VII plaintiff is entitled, as a matter of course, to access to all the University's records relating to such review and to its challenged actions respecting the Title VII plaintiff) (b) erred in not holding that a University's refusal, in such case, to grant the Title VII plaintiff access to such records creates a legal inference that such records, if produced, would have been favorable to the contentions of the Title VII plaintiff.

3. The University's claims of privilege (a) are based on erroneous factual assumptions; (b) are contrary to law; and (c) if allowed would ordinarily prevent judicial enforcement of Title VII with respect to university faculty employment, an important area of employment.

4. The Court of Appeals' inexplicable failure to decide the issue of pretext, which was properly before it, so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. (This is briefed in Lynn's Cross Petition for Writ of Certiorari, No. 81-2005.)

To place these matters in focus this response will first present a short summary of relevant facts, followed by a brief analysis of the Court of Appeals' decision.

BACKGROUND FACTS

Lynn was formerly employed by the University as an assistant professor at its Irvine campus. Her scholarly field was Medieval French Literature. In 1976 the University denied her promotion to tenure. It also terminated her employment effective one year later.

This suit charged that such actions were based on unlawful sex discrimination. The University's defense was its claim that its actions were based on its review of Lynn's scholarly work which had concluded that Lynn's scholarship was inadequate.

Lynn sought discovery of the records of such review. The University refused. The District Court refused to require the University to produce such records. Instead, it issued a protective order shielding the University from producing them. (R.T. 22-24, 604-607, C.R. 15)

The records of the University's review, accordingly, were not introduced into evidence except for copies of a few papers (Exhibit 23) which Lynn introduced. She had received them from Dr. Nicole Marzac, a member of a University committee which had reviewed Lynn's scholarly work. Dr. Marzac, a full professor at the University of California's Davis campus, in Medieval French Literature - Lynn's field - was a graduate of the University of Paris (the Sorbonne) in Paris, France, and had formerly been a full professor at Cambridge University and London University in England.

Dr. Marzac testified that a majority of the outside scholars contacted by the University had approved Lynn's scholarly work; that Lynn was eminently qualified for promotion to tenure; "She is a pioneer in her field;" and that the University's decision against Lynn was based on unlawful sex discrimination. (Ex. 23, Doc. 2 p. 2-6, Marzac Deposition 41-43, 57-58. In evidence R.T. 449-453). The University did *not* cross examine Dr. Marzac respecting such testimony.

Dr. Marzac was the *only* scholar in Lynn's field, other than Lynn, who testified at the trial.

The District Court found that "Her [Lynn's] work was favorably commented on by a majority of [the outside] scholars." (C.R. 52 p. 5)

The University presented *no* evidence that Lynn's scholarship was inadequate.[1]

THE COURT OF APPEALS' DECISION

After holding (a) that Lynn had proved a prima facie case and (b) that the University had articulated a legitimate reason for denying tenure, the Court of Appeals *inexplicably* refused to decide the issue of whether such reason was "pretext," an issue which had been briefed and argued (656 F2d 1337 at 1345). It then held that the *University* had caused the District Court, at the trial, to violate *Lynn's* due process rights, requiring a reversal. (p. 1346) It then refused to decide "whether tenure review files . . . are privileged in academic Title VII cases generally." Instead it gave 3 pages of "some guidance" to the District Court, for use on retrial, on the subject of balancing "the University's interest in confidentiality" with the "need which Title VII plaintiffs have" for such evidence. (P. 1346-1349)

ARGUMENT

A. LYNN'S POSITION.

1. Where, as in this case, a University defends a claim of unlawful employment discrimination by a claim that its action was based on its review which showed that the Title VII plaintiff's scholarship was inadequate, the Title VII plaintiff is entitled, as a matter of course, to access to all the University's records relating to such review and to its challenged actions.

(a) Lynn's position is supported by *United States v. Nixon* 418 U.S. 683 (1974), *Herbert v. Lando* 441 U.S. 153 (1979) and *Green v. McElroy* 360 U.S. 474 (1959).

Nixon, in which the *President* was required to produce "confidential" records, held:

> "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends

---

1. "The University offered no evidence as to the quality of Lynn's scholarship except for the ultimate conclusion reached at the end of the review process . . ." (University's Petition for a Writ of Certiorari p. 6, footnote 3.)

of criminal justice would be defeated if judgments were founded on partial or speculative presentations of the facts." (418 U.S. at 709)

Lando held that the principles set forth in *Nixon* are also applicable to claims of privilege in *civil* cases. (441 U.S. at 175)

It is self evident that a Title VII judgment will be "founded on partial or speculative presentations of the facts" *if* a University which claims it based its challenged actions on its review which showed the Title VII plaintiff's scholarship was inadequate is permitted, without penalty, to deny the Title VII plaintiff access to its records which, it claims, show such inadequacy.

For example, Lynn was the only scholar in Medieval French Literature at the University's Irvine campus. The University sent copies of Lynn's work to Medieval French scholars at other places, for evaluation. It is self evident that the evaluations of Lynn's work by such "outside" scholars plus the analyses and recommendations which University employees made to the Chancellor (the official who makes the final decision as to promotion to tenure) are *strong evidence* (a) of the quality of Lynn's scholarship and (b) whether or not the University's decision not to promote Lynn was motivated by sex discrimination.

If the Title VII plaintiff is denied access to such "strong evidence" it is self evident that the judgment, in the words of *Nixon,* will be "founded on partial or speculative presentations of the facts."

Green held invalid a denial of Green's security clearance (such clearance being a requirement to holding his job with a defense contractor) because the clearance had been denied, in part, on the basis of "confidential" evidence as to which Green "was not afforded the safeguards of confrontation and cross examination." (360 U.S. at 580).

It is self evident that if a court (i) should refuse to permit a Title VII plaintiff to have access to the evidence on which a University's decision, against the plaintiff, is based and (ii) should nevertheless treat the University's decision as *evidence* that the plaintiff's scholarship was inadequate, such actions would violate the principles set forth in *Green,* supra.

(b) Lynn's position is also supported by the 1972 amend-

ments to Title VII which extended its coverage to university faculty employment.

Such extension has been explained as evidencing a Congressional concern over the "pervasive nature of *discriminatory university employment practices.*" *Powell v. Syracuse University* 580 F2d 1150, 1154 (2nd Cir. 1978, emphasis added.)

It is self evident that such "pervasive . . . discriminatory University employment practices" cannot effectively be eradicated if, by a claim of "privilege" universities (i) can *conceal* the evidence, or lack of evidence, on which their challenged employment decisions are based and (ii) can *limit* Title VII plaintiffs to "partial or speculative presentations of the facts."

(c) Lynn's position is impliedly supported by this Court's decision in *Texas Department of Community Affairs v. Burdine* 450 U.S. 248 (1981)

In *Burdine* the Court stated:

> ". . . . we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proferred explanation lacking a factual basis is a pretext." (450 U.S. p. 258)

If, however, a university's privilege claim is permitted to limit Title VII plaintiffs to "partial or speculative presentations of the facts" it *will* be particularly difficult for a Title VII plaintiff to prove pretext. *Burdine,* accordingly, *impliedly* supports Lynn's position that Title VII plaintiffs are entitled to access to the university's records relating to its challenged employment actions.

B. THE UNIVERSITY'S ARGUMENTS

1. *The University's petition erroneously implies that the University furnished Lynn with a substantial equivalent of access to its confidential records when it gave Lynn a paper which its petition erroneously called "a comprehensive summary of the confidential evaluations."*[2]

(a) *Said purported summary (Exhibit 18) is NOT "comprehensive."*

---

2. The University's petition refers to such "comprehensive summary" on pages 2, 4 (two references) 7 (footnote 4) and 11. Footnote 4 states "the summary is in evidence (Ex. 18)."

(i) Such "summary" admits this on its face. It states:

"It must also be understood that this summary does not attempt to guess at the relative weight given to one confidential evaluation over another unless specific comment is made in the dossier. In short this is a summary of the *substance* of the confidential material in the dossier, not an evaluation of the material in it or an explanation of the decision." (p 1)

It is obvious that the Chancellor, in making the decision not to promote Lynn to tenure, *must have been* assisted by "an evaluation of the material" and "an explanation of [his proposed] decision." For him to decide, merely on the basis of a mass of unevaluated material, is unbelievable.

Evaluations and explanations are normal supports of most executive decisions.

Such summary, by omitting the detail of the evaluations and explanations on which the Chancellor's decision rested, omitted material facts highly relevant to the issue of sex discrimination.

(ii) Exhibit 18 "Summary of Substance of Confidential Material in Personnel Review File of Dr. Therese Lynn" is 14½ typewritten pages in length. Because Lynn was denied access to the confidential material allegedly so summarized, we do not know how many pages the confidential material comprised. However, during the trial, after Dr. Marzac's deposition and accompanying papers had been received in evidence, the University's counsel delivered to the District Court, and the Court accepted over Lynn's objections, "three black bound volumes" of material for the Court's "in camera" review. The University represented that they reflected "the materials before the ad hoc committee [and] the review of the ad hoc committee," concerning Lynn. (R.T. 382, 410, 411, 608) The Court of Appeals held this "in camera" inspection by the Court, violated Lynn's due process rights. (656 F2d at 1345-1346).

It is self evident that a 14½ page "summary" of the contents of "three black bound volumes" is *not* a "comprehensive summary."

(iii) Exhibit 23 contains Dr. Marzac's 6 page May 2, 1976 minority report to Chancellor Aldrich. Exhibit 18, page 13, contains an 11 line summary of what it calls "this dissenting

opinion." The contents of such 11 lines indicate it referred to Dr. Marzac's 6 page minority report. It is self evident that an 11 line summary of a 6 page "dissenting opinion" is *not* a "comprehensive summary."

(b) *Said purported summary of the University's confidential records is incomplete, materially misleading, and "covers up" evidence of unlawful employment discrimination by the University.*

This is demonstrated by a comparison of the 11 line summary mary on page 13 of Exhibit 18 with Dr. Marzac's minority report, in Exhibit 23. Because of the obvious importance of the University's "cover up" in its "comprehensive summary," of evidence of its unlawful employment discrimination, the text of the University's 11 line summary of Dr. Marzac's minority report, in Exhibit 18, and the text of Dr. Marzac's "minority report," in Exhibit 23, are attached as Appendix A and B, respectivelv.

Evidence of the University's unlawful discrimination against Lynn, which was contained in Dr. Marzac's minority report and *omitted* in the University's "comprehensive summary," Exhibit 18, includes the following material omissions, which are now quoted:

> (i) "(a) misrepresentation of the supporting evidence; . . . *Misrepresentation of evidence.* The record shows that Dean Lillyman's letter of January 5, 1976 reads as follows: 'Mrs. Lynn has produced written work which (. . .) most of the outside reviewers do not consider to be scholarly . . .'" (p. 3)

Dr. Marzac's report then analyzed, in detail, the reports of the outside scholars and concluded that a majority supported Lynn's scholarship and stated:

> ". . . of the leading authorities, 4 are strongly in favor of Prof. Lynn's scholarship as against 2 who are not." (p. 4)

(Dean Lillyman's reported misstatement is also contradicted by the District Court's finding (C.R. 52 p. 5) that Lynn's work was "favorably commented on by a majority of [the outside] scholars." This finding accords with Dr. Marzac's statement in Exhibit 23, set forth above, and with her testimony. (Marzac deposition p. 41))

(ii) ". . . reviewing the two letters written by Chairman Tonelli to the Chancellor . . . I cannot help but be disturbed by the blatant contradictions they contain . . ." (p.5)

Dr. Marzac's report then analyzes such letters and concludes:

"Such contradictory, one sided and unsubstantiated statements create the impression that Prof. Lynn is being deliberately victimized." (p.6) (emphasis ours).(The summary, however, does not contain the details which would enable a Title VII plaintiff to show this.)

(iii) ". . . she [Lynn] is a pioneer in her field." (p. 6)

(iv) "I fear that if the recommendation of the majority of the committee not to reappoint Prof. Lynn is endorsed . . . It may further *lay itself open to a charge questioning its [the University's] integrity."* (p. 7) (emphasis ours).

It is self evident that the above quoted portions of Dr. Marzac's minority report, which are *omitted* in the University's "comprehensive summary of the substance of the confidential evaluations" (sic), set forth *significant evidence* that the University engaged in unlawful sex discrimination when it denied Lynn tenure.

By omitting such significant evidence of the University's violation of Title VII, the "comprehensive summary" engaged in a "cover up." The "comprehensive summary" appears analogous to the notorious "edited tapes" which hampered the Watergate proceedings until this Court, in *Nixon,* supra, ordered that access be granted to the actual tapes.

Because Dr. Marzac furnished Lynn with a copy of her 6 page minority report, Lynn was not misled by the University's 11 line, inadequate, and, if we may say so, fraudulent summary of it. The great significance of the University's fraudulent 11 line summary of Dr. Marzac's minority report is that it shows that the University's "comprehensive summary of the substance of the confidential evaluations" (sic) has been used, by the University, to "cover up" significant evidence of its violation of Title VII.

The foregoing shows that the paper described in the University's petition as a "comprehensive summary of the confiden-

tial evaluations" (a) was not "comprehensive" (b) omitted material evidence relating to the issue of sex discrimination and (c) "covered up" evidence that the University's denial of tenure to Lynn violated Title VII. The University's petition was egregiously erroneous in inferring that Lynn's access to such "summary" (sic) was substantially equivalent to access to the University's confidential records concerning Lynn.

2. *The University's petition erroneously infers, page 2, that the evaluations should be kept confidential because the University "has promised [the evaluators] confidentiality in the submission of their evaluations."*

This erroneous inference ignores the facts: (a) the amendments extending the protections of Title VII to university faculty employment were enacted in 1972 and (b) the evaluations involved in the case at bench were made in the 1975-1976 academic year.

The 1972 extension of the protections of Title VII to university faculty employment was intended to eradicate "pervasive . . . discriminatory university emloyment practices" (p. 6, supra). To help accomplish this Title VII, as amended, (a) made sex discrimination in university employment *unlawful* (b) granted a Title VII plaintiff a *right* to a *judicial* determination as to whether or not a challenged employment decision was unlawful.

Persons who participate in university faculty employment decisions after 1972, are obligated (a) *not* to engage in employment practices made unlawful by Title VII and (b) *if* an employment decision, in which they participated, is challenged in Federal Court as a violation of Title VII, to give evidence when properly summoned. (See *In re Dinnan* 661 F2d 426 (5th Cir. 1981, Cert. den. 6/7/82) It should be obvious, to any level headed evaluator, that the University's promises of "confidentiality" can not and should not apply to the tiny percentage of cases where an employment decision is challenged in Federal Court as violating Title VII.

Nixon and *Lando,* supra, held that claims of privilege must *yield* to the need for evidence in judicial proceedings in the "infrequent occasions" (*Nixon,* supra 418 U.S. at 709) and in the "tiny percentage of cases in which error is claimed and litiga-

tion ensues." (*Lando*, supra, 441 U.S. at p. 174).

The foregoing shows that the University's selection process will not be significantly injured if full disclosure is required in those infrequent occasions when the University's conduct is challenged, in Federal Court, as violating Title VII.

3. *The University's petition concludes (p. 12) with an unconstitutional and erroneous proposal that a Title VII plaintiff should be granted access to the university's records concerning such Title VII plaintiff*

> *"only when the court (or some impartial academician designated to serve as special master) is first satisfied that the University's summaries are unfair or inaccurate, or that the file contains some evidence of improper discrimination against the plaintiff."*

Such proposal, if granted, would be another violation of Lynn's due process rights, caused by the University.

The question of whether "the file contains some evidence of improper discrimination against the plaintiff" is one of the major issues in the case at bench. This is why.

The University's defense is its claim that its denial of tenure to Lynn was based on its review which showed that Lynn's scholarship was inadequate. The records of such review, and the inferences to be drawn from the evaluations, therefore, go to the heart of the case.

The Title VII plaintiff should *not* be denied access to *those* records on the basis of an *in camera evaluation* of them by the District Judge or by an "academician."

The Title VII plaintiff is entitled to access to such records so the Title VII *plaintiff* can present to the Court the *plaintiff's* evaluations of the University's review and whether or not the University's conclusions therefrom were based on sex discrimination.

Nixon, supra, stated:

> "We have elected to employ an adversary system of criminal justice in which the *parties* contest *all issues* before a court of law." (418 U.S. at 708, emphasis ours)

If the District Judge, or "academician," denies the Title VII plaintiff access to such records, the Title VII plaintiff will be severely handicapped in contesting *basic issues* of this case.

Green, supra, reversed a denial of a security clearance because, at the administrative hearing, the employee "was not afforded the safeguards of confrontation and cross examination." (360 U.S. at 508).

If the Title VII plaintiff is denied access to the University's confidential records, the Title VII plaintiff will be denied the right of confrontation and cross examination with respect to very important evidence in the case.

The authorities set forth on pages 4-6, supra, demonstrate that the Title VII plaintiff is entitled, as a matter of course, to access to such records.

The Petition for Writ of Certiorari should be granted and the case decided in accordance with Respondent's statement of position set forth on p. 2, supra, and the prayer of Respondent's Cross Petition No. 81-2005.

Respectfully submitted,

JOHN G. SOBIESKI
LADA S. MARX
Attorneys for Respondent

Appendix

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Appendix A

Excerpt from page 13 of Exhibit 18:
"SUMMARY OF SUBSTANCE OF CONFIDENTIAL MATERIAL IN PERSONNEL REVIEW FILE OF *DR. THERESE LYNN,* (Review conducted in 1975-76 academic year.)"

There is a dissenting opinion. In this opinion, Dr. Lynn has been responsive to a call for a broad approach to medieval studies, "for a research which asks rather than answers questions," which goes to primary sources in a broad realm of knowledge, and which is satisfying to both the layman and the specialist (it opens new avenues of thought and relationships without getting bogged down by the mere process of scholarship). Nizet is a good publisher and this is to Dr. Lynn's credit. This reviewer feels this type of work is new (others disagree), and that guidelines should be stretched to accommodate someone who is attempting it.

Appendix B

UNIVERSITY OF CALIFORNIA, DAVIS

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DEPARTMENT OF FRENCH AND ITALIAN DAVIS, CALIFORNIA 95616

May 2, 1976

To: Chancellor D. Aldrich
From: Prof. Nicole Marzac
Re: Minority report on the review of the recommendation for the non-reappointment of Therese Lynn, Assistant Professor, Step II off-step, Department of French and Italian.

The inter-campus committee appointed to review the recommendation for the non-reappointment of Therese Lynn, Assistant Professor, Step II off-step, Department of French and Italian, Irvine campus, met on 28 April, 1976. The members of the committee were:

Colin Slim, Fine Arts, Chairman
Gerald Herman, Fr. and Italian, Davis campus
Nicole Marzac, Fr. and Italian, Davis campus
Edgar Schell, English and Comp. lit.
Carol Whalen, Soc. Ecol.
Barbara Jones, Student.

Of these 6 members, two are specialists in the field of the candidate (Profs. Herman and Marzac). By their own admission, the remaining members of the review committee were not conversant enough with French to deal with the scholarly assessment of either the 10 articles or the book submitted by the candidate.

The purpose of this minority report, solicited by the chairman of this review committee is not only to present the facts as they pertain to Prof. Lynn's activities, but also to shed light on the deliberations themselves so that, should some details have been inadvertently omitted in the majority report, they may be included here.

While other votes on Professor Lynn's research were

negative, two factors that may have influenced that decision stand out:

(a) misrepresentation of the supporting evidence;

(b) the discussion itself, consisting primarily of a dialogue between Prof. Herman and myself, with only minimal participation by one other member of the committee (Prof. Schell).

I will now elaborate on each point:

Misrepresentation of evidence. The record shows that Dean Lillyman's letter of January 5, 1976 reads as follows: "Mrs. Lynn has produced written work which (. . .) most of the outside reviewers do not consider to be scholarly . . .". However, there are in fact 5 letters in favor of Mrs. Lynn's research (Profs. Paul E. Barrette; Gerald A. Bertin; Barbara M. Craig; Norris J. Lacy; Germaine Bree), and 4 letters against (Profs. Karl D. Uitti; R. Howard Bloch; Paul Zumthor; Larry S. Crist).

Furthermore, 4 of the 5 positive letters are from established scholars in the field, which I shall mention with their relevant publications in book-form:

1. Barrette: *Robert de Blois's et Lyriope,* 1968
2. Craig: *L'estoire de Griseledis,* 1954
3. Lacy: *A medieval French Miscellany,* 1970
4. Bree: *An age of fiction,* 1957
   Combray, 1952
   Du Temps perdu au Temps Retrouve, 1950
   French Theatre to-day, 1960
   Literature and Society, 1963
   Marcell Proust and the deliverance from time, 1955
   Women Writers in France, 1973
   The World of Marcel Proust, 1966

The 5th is also an important scholar, although perhaps not in the same category as the other 4. In addition, the 5 unsolicited letters (Profs. Nancy Joyner; Judith Rice Rothschild; Susan Stuard; Martha Lee Osborne; Heidi Rockwood) unanimously praise the quality and depth of Prof. Lynn's scholarship.

On the other hand, of the 4 negative letters, only 2 are by outstanding scholars, which I shall mention with their relevant

publications in book-form:

1. Uitti: *Linguistics and literary theory,* 1969
2. Zumthor: *Essai de poetique medievale,* 1972
   Histoire litteraire de la France medievale, 1954
   Langue et techniques poetiques, 1963

One of the others scholars (Larry S. Crist) is so far known for one book, published in collaboration with Robert F. Cook: *Le deuxieme cycle de la croisade,* 1972 followed the same year by the seond part of the text edited earlier (Saladin). As to the other, his scholarship does not yet appear to have reached the catalogues of the main libraries. It would thus appear that, of the leading authorities, 4 are strongly in favor of Prof. Lynn's scholarship as against 2 who are not. This discrepancy between the Dean's letter and the facts themselves I presented to the committee on April 28.

Three of the four committee members who voted for the non-reappointment of Prof. Lynn did so, it appears in the discussion that followed the vote, with a "51 per cent - 49 per cent mind". This exactly quotes the expression used by one member and agreed to by the others. It is also significant that, after the final committee vote of 4 to 2 against the reappointment of Prof. Lynn, the dismayed student member commented: "So you mean you are going to let a Professor like Mrs. Lynn go, when, by unanimous agreement of all students, she is the best instructor they have ever had . . .". She continued to eulogize Mrs. Lynn's work. The committee made no comment at all, though she was later subtly intimidated into changing her expression of views on an important issue.

The discussion. The second important factor is the unbalance with which Prof. Lynn's services to the University were evaluated. Her teaching as well as her University and Community services were found to be excellent and her dossier contains 8 highly laudatory letters concerning her University service (Henry Fagin, Prof. of Administration; Vivian H. Hall, Women studies; Prof. Janet Williams Palmquist; Alice L. Anderson, Director of Education and Liberal Arts; Dr. Stuart M. Krassner, Associate Dean, Graduate division; Prof. Jay Martin; Dean Richard N. Baisden; Assistant Dean Lorraine

Reed). Her teaching was consistently assessed as excellent by students and it is worthy of note that Prof. Lynn taught 7 classes in 1971-72 and in 1972-73; 10 (ten) classes in 1973-74; 7 classes in 1974-75 despite her being on sabbatical leave during 2 quarters (one in residence) out of 3 quarters of that year. I made a point of bringing up the issue as stated in *Instructions to appointment and promotion committees* (Office of the President, Aug. 29, 1969, Section D "Criteria for Appointment and Promotion": "In evaluating the candidate's qualifications within these areas (i.e. the areas of teaching, research, University and public service), the committee shall exercise reasonable flexibility, balancing, where the case requires, heavier committments and responsibilities in one area against lighter committments and responsibilities in another". In the light of this, it is difficult to understand the decision reached by the other members.

Moreover, reviewing the two letters written by chairman Tonelli to the Chancellor, those dated 18 December (a letter no doubt designed to be read by the Departmental Faculty) and 23 December 1975, I cannot help but be disturbed by the blatant contradictions they contain. On the one hand, the first letter (p. 4) states (end of para. 1): "Her teaching performance is characterized by clearness of presentation, originality of content, good organization, generosity with her time and by a warm and relaxed rapport with the students." and (para. 3) "Professor Lynn has made an important contribution to University service. She is capable of handling the tasks before her efficiently and her work is very much appreciated and valued by colleagues who work with her". On the other hand, the second letter states (Para.e. — the underlinings are my own): "Her teaching and University service records are good and, if they were the only categories to be reviewed they would be such as to warrant tenure. However, I don't consider these so outstanding as to outweight the clearly doubtful quality of the research. In any case, her record in both teaching and University service is not in my mind superior to the record of the rest of the faculty of this department whose research is of better quality than Prof. Lynn's." I fail to see why Prof. Lynn should be judged in comparison with her other colleagues and

not on her own merit and if, as it appears here, the second letter represents the Chairman's sole opinion in the Department, it is to be questioned why he did not air his opinions at the Faculty meeting. Similarly, one wonders why Prof. Tonelli who admits in his second letter (para. a.) that he is "not a specialist in Medieval Literature", writes (para. b. — the underlining is my own): "The overall quality of the research done in this Department, including the research of the junior faculty, is in my mind of a much higher caliber". Such contradictory, one-sided and unsubstantiated statements create the impression that Prof. Lynn is being deliberately victimized.

Evaluation

Finally, were I evaluating my colleague, Prof. Lynn, as I did orally in committee on April 28, I would state it in writing in the following manner:

Prof. Lynn answers to the pleas made by our great scholars Cohen and Frappier for a broad, encompassing approach to medieval studies,reaching other scholars and sharing information; for a research which asks rather than answers questions forcefully (this often killing them in the process!); for an approach which, going back to the primary sources encompasses the realm of knowledge: various sciences and philosophies; for a research which is satisfying for the discriminating layman, because it rejects jargons and obscurities, and which is appealing to the specialist, in that it opens new avenues of thoughts, relationships between concepts, artistic and literary forms, without getting bogged down by the mere process of scholarship. This is exactly what Mrs. Lynn's research satisfies and she is a pioneer in her field. Indeed her book is so highly thought of in France that Nizet (who, with Vrin, is the leading French publisher in this scholarly field) is going to publish it. In view of this, I reminded the committee of the instructions to appointment and promotion committees (Office of the President, August 29, 1969) section D: Criteria for Appointment and Promotion: "As the University enters new fields of endeavor and refocuses its ongoing activities, cases will arise in which the proper work of faculty members departs markedly from established academic patterns. In such cases the review committees must take exceptional care to apply the criteria with sufficient flex-

ibility".

In conclusion, I must emphasize one extremely important factor: that, of the two specialists in Medieval French: Herman (no publication in the book form yet) and Marzac (*Richard Rolle de Hampole . . . et edition du Tractatus super Apocalypsim . . .*1968; *Edition critique du sermon Qui manducat me de Robert Ciboule . . .* 1971; *The Library of a French Bishop . . .* 1974), Prof. Herman made a number of positive appraisals on Prof. Lynn's research (which will no doubt appear in the majority report) with which I concurred, but meanwhile, he declined to give any negative criticism of his own, but preferred to quote only and precisely the negative comments already brought forward in the letters of appraisals written by others.

I fear that if the recommendation of the majority of the committee not to reappoint Prof. Lynn is endorsed, it may well turn out to be a decisive force in the Department to affect the morale of other Faculty members to say nothing of the disastrous effect on the students, as witness the reaction of the student member of the committee. It may further lay itself open to a charge questionning its integrity. I know we are all concerned to reach a fair and objective result.

Truly,

Nicole Marzac

Nicole Marzac
Professor of French

Amicus Brief

81-1962

No. .....

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1981

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

THERESE BAILEY LYNN,
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

Brief of The Board of Trustees of the Leland Stanford Junior University as Amicus Curiae

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Cases	Pages
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No. .....

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The United States Court of Appeals for the Ninth Circuit

Brief of The Board of Trustees of the Leland Stanford Junior University as Amicus Curiae

This brief *amicus curiae* is filed by The Board of Trustees of the Leland Stanford Junior University (hereafter, Stanford) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICI

Stanford is a private university located and operating in California. It is a research university: an institution whose function is not only to transmit, but also to generate,

knowledge. If its purposes are to be served, the faculty of a research university must consist primarily of the most outstanding scholars, working at the boundaries and foundations of their fields.

The tenure review process is a critical—perhaps *the* critical—part of maintaining the quality of faculty at that level which will permit the institution to carry out its purposes. At Stanford, as at most other private and public research universities, the process is similar in the relevant respects to the one used at the University of California at Irvine, as described in the amended opinion of the Ninth Circuit (*Lynn v. Regents of the University of California*, 656 F.2d 1337, 1340, December 18, 1981; slip opinion at 4744-45) (hereafter, citations to the "amended opinion" give the slip opinion page numbers). Stanford is interested in this matter because the amended opinion is so broad, and purports to state rules of law of such general application, that, if it is permitted to stand, faculty employment decisions of Stanford and other colleges and universities may well be subject to those rules despite their inappropriateness to different facts. We do not contend that the identities of evaluators should never be disclosed to plaintiffs to whom tenure has not been granted, but only that the trial court should be able to exercise some discretion in weighing the interest in confidentiality against the possibility that specific information might constitute or lead to evidence of unlawful discrimination.

The attention of the parties to this dispute naturally will be directed primarily to the narrow situation here in issue. But the amended opinion will adversely affect many institutions, including Stanford, which are not party to this litigation, and in situations that do not have the unusual features found here. By effectively eliminating the confi-

dentiality of peer review, the unnecessary breadth of the amended opinion threatens the traditional tenure process which hitherto has guaranteed the continued excellence of American higher education.

In our view, moreover, the interests of faculty members who will in the future be considered for tenure—including particularly individuals who are members of groups that have been underrepresented and discriminated against—are also likely to be adversely affected by the decision below in ways that may not immediately be apparent. We do not, of course, purport to represent those individuals. But as an institution which has a genuine committment to equal employment opportunity, and to improving the diversity as well as the quality of our faculties, we have an interest in faculty appointment and tenure processes that assure decisions made on the basis of excellence and not of prejudice. As we argue below, the amended decision of the Ninth Circuit Court of Appeals will work against this interest.

The amended decision purports to hold only that Ms. Lynn was denied due process of law by being deprived of access to her tenure review file in the narrow circumstance where the district court had received and reviewed the file, and used its contents as evidence in reaching a decision on the merits. The question whether the court fairly characterized the proceedings below is one for the parties, and not for an amicus curiae. And, assuming the facts to be as the court below asserts, the putative holding is surely unexceptionable. But the amended decision goes on:

> In view of our holding, we need not decide the question whether tenure review files, and more particularly peer evaluations, are privileged in academic Title VII cases generally. We do wish, however, to provide the district court with some guidance on the question since

> that court will be required, once again, to consider the issue of Lynn's right to obtain her tenure review file, upon remand. Slip opinion at 4752.

The "guidance" provided is, in our view, the real mandate of the case, and is the source of our concern. For, having denied the need to decide the general question of the privileged status of peer evaluation in academic cases, the court nonetheless went on to rule that *"when evaluations serve [in whole or in part] as the alleged basis for the University's decision* to deny tenure or promotion, the plaintiff's interest in proving his case outweighs the University's interest in protecting the confidentiality of a file." *Id.* at 4752-53 (emphasis added).

For a research university, this is every case.

To the extent that the court seems to suggest that its ruling applies only to a limited subset of Title VII cases involving university faculty, it profoundly misunderstands the nature of the tenure review process, and the extent of the university interest in confidentiality of the peer reviewers. Virtually no faculty member ever reaches the point of consideration for promotion to tenure who has not earned the appropriate degrees and who has not produced some scholarly writing. For the institutions concerned to maintain the excellence of their faculties, the task in *every* tenure review is to judge the quality of research, not its quantity, and certainly not its mere existence.*

For Stanford and similar universities, therefore, the danger of this decision's standing is that under its apparent

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*See slip opinion at 4750, and footnote 8. Teaching is usually the other important component in tenure decisions, but as the evaluation of teaching is apparently not involved in this case as viewed by the court, it will not be discussed here.

rule, an allegation of discrimination will result in the abrogation of confidentiality in every case; this, in turn, will diminish, possibly totally destroy, the ability of the University to obtain the candid and detailed evaluation that make it possible for tenure and promotion decisions to be made on a sound and equitable basis. We file this brief, therefore, to provide information that we believe to be critical to the decision whether a writ of Certiorari should issue: information about the importance of tenure review decisions in research universities, the role that the confidentiality of the identities of peer reviewers assumes in the decision process, and the probable effects of the decision below.

We have been authorized to state that the University of Michigan supports the position advanced in this brief, and joins Stanford in urging the Court to grant a writ of Certiorari.

ARGUMENT

For any tenure-granting institution, a tenure decision is a crucial one; a tenured "slot" is one of the most limited resources in academe, and, particularly in these times of retrenchment, must be awarded with extreme care. A faculty member granted tenure may well hold that place for decades, until retirement. For a research university, however, the tenure decision is particularly difficult as well as important, because the institution is making a judgment—a prediction, usually based on a record of some six years' work—that the individual will not only be an excellent teacher, but will produce scholarly works of the highest quality: research not just sound, but innovative and germinal. For example, the "Procedures for Recommending Appointments, Reappointments, and Promotions in the Stanford Faculty" (hereafter, "Stanford Procedures") provide:

Reappointments and promotions resulting in the acquisition of tenure:

The full documentation and careful judgments called for in these papers reflect the fact that the decision to confer tenure is among the most important in the professional life of the individual and the academic life of the University.

When it is proposed to reappoint or promote a member of the Stanford faculty to tenure status, the department or school is under special obligation to present evidence that the candidate is among the two or three of the very best persons at a similar level of professional development and that the individual has made significant scholarly contributions. . . .

A documented comparison of the candidate with the best persons in his or her field and at a comparable level of career development is essential, even though it is a difficult and burdensome task, especially when there is a comfortable and apparently solid judgment that the individual now in the position is well qualified.

The tenure judgment can only be sound if it is based significantly on expert opinions of the work the candidate has already produced, as compared to the work of others in the same field. The evaluators themselves must be very carefully chosen: They must be people whose own scholarly reputation in the field is above question, whose knowledge of developing scholarship in the field is both broad and deep, and whose assessments can be expected to be made fairly. Most important, the evaluations should be candid, thorough, and detailed, so that the decision-makers can use them as the basis of their own judgment. And there should be a reasonable number of evaluators, so that the decision will not be unduly influenced by an unrepresentative view, whether biased or merely maverick.

Given the diversity of the subject matter in which faculty members specialize, it is likely that there is a fairly small class of potential evaluators. Some may be colleagues in the same institution, but most are from outside—usually from the faculties of other research universities. They are people at the top of their profession, with many calls on their time, and no particular obligation to the institution that is requesting them to perform—free—an onerous and possibly unpleasant task.* Obviously, it would be easier and less unpleasant to write a bland and general evaluation; and equally obviously, that would not serve the purpose. As the Stanford Procedures note,

> Evaluations consisting of mere endorsements of the candidate are of little use. By far the most useful and valuable evaluations are those which insist upon comparative judgments in letters requesting information.

At Stanford, as at Irvine, the University undertakes to hold in confidence the identities of those who supply these evaluations. It is our judgment that the candor, the concrete detail, and, perhaps most important, the specific comparisons among individuals in the field, which we seek are only obtainable if the writer is reasonably assured of confidentiality. Further, it is the experience of many of our own faculty members that when they are asked to comment on individuals without being given such assurance, there is an irresistable tendency to tone down criticism,

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*University faculty members are almost unique in that they work without supervision and their career steps are determined by the opinion of their qualifications formed by peers—both within and without their institutions. This contrasts with most other employment environments where such determinations are made by the employee's supervisor, a person known to the employee and whose responsibilities include the evaluation and improvement of the employee's job performance.

to avoid specifics, and to resort to vapid generalities. Many will refuse to write letters of evaluation under such circumstances. The obvious result of eliminating confidentiality is that the detailed and comprehensive written evaluations we are now able to obtain will be replaced by brief and unhelpful letters, or supplanted by oral communications not reflected in the file. In practice, this will mean that individuals who are in fact discriminated against will be doubly disadvantaged: the written record will not help those who are part of the institutional tenure review and appeal processes to discover and reject biased—or, indeed, merely incorrect—judgments; and the files, which can now be reviewed *in camera* for items that evince, or that could lead to evidence of, bias, will be available to plaintiffs, but useless to them. If the barn is open, nobody will keep horses there.

We believe, therefore, that confidentiality is essential to the assured maintenance of an outstanding faculty. At one point, at least, the court below apparently agrees:

> When determining whether tenure review files, including peer evaluations, are privileged, courts have balanced *the university's interest in confidentiality, i.e., in maintaining the effectiveness of its tenure review process,* and the need which Title VII plaintiffs have for obtaining peer evaluations in their efforts to prove discriminatory conduct. *Id.* at 4752 (emphasis added).

At Stanford, faculty members are afforded access to all material in their files except letters of reference (which include written evaluations of qualifications and competence, and written notes of oral evaluations). Summaries of these confidential materials are made available to the faculty member being reviewed, which summaries are as detailed as is consistent with protecting the names and

other personally identifiable details of the individuals who made specific comments. We attach as an appendix a declaration made in another context* by Stanford's Vice Provost and Dean of Research, describing more particularly the policy and practice at Stanford, and the reasons for them; it is, we believe, representative of tenure review at the other research institutions. Although it is not clear whether U.C. Irvine's practice is identical, the opinion below notes that Ms. Lynn received "summaries of the comments of her evaluators." It would be a simple matter for a court to inspect the summary, and compare it with the full file, to ascertain whether any material relevant to the claim has been omitted or distorted; if it has, then certainly the plaintiff should be supplied with the original material. Equally, if the trial court finds that the identities of the commentators would lead to evidence supporting the plaintiff's claim, it could make them available: where the trial court finds that the need for specific information outweighs the general considerations in favor of confidentiality, that information should be released. Since these cases are likely to be rare, they would not, we believe, destroy the ability of universities to obtain the kind of evaluations it needs.

But the Court of Appeals did not, apparently, bottom its ruling on a finding that Ms. Lynn's need for particular items denied to her in fact outweighs the need for confidentiality in this case. Indeed, the amended opinion specifically prohibits the trial court from "considering the nature of . . . [the file's] contents or making any *in camera* review thereof." *Id.*, slip opinion at 4754a, footnote 20. The only conclusion that seems possible is that the Court of Appeals

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Board of Trustees of Leland Stanford Junior University v. Superior Court of Santa Clara County, 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (May 28, 1981).

has declared an absolute rule, has reached a single balance, for all cases, notwithstanding that the factors that ought to be weighed may vary considerably from case to case. By ruling that the contents of the file can not be considered in deciding whether plaintiff will have access to them, the court completely disregarded the importance of that confidentiality which it had already acknowledged as "maintaining the effectiveness of the tenure review process." We believe that certiorari should be granted in order to correct this most unjustified overgeneralization.

The Court of Appeals makes some attempt to mitigate the absoluteness of its rule by stating that the University of California at Irvine had a smaller than usual interest in the confidentiality of the file in Ms. Lynn's case, for the reasons that one faculty member had voluntarily, and possibly in violation of the University's rules, disclosed to Ms. Lynn copies of the minority report, the minutes of the tenure review committee, and her own letters on the subject of Ms. Lynn's promotion, and also that the chairman of the committee was required, on cross-examination, to testify about the personal views of the committee members.

But the fact that some confidential information has been disclosed does not mean that all of the file should be disclosed. For example, it is by no means uncommon, and it is certainly not improper, for some outside commentator to supply the subject of the review with a copy of his or her written comments. The fact that this happens in a given case surely cannot be held to release, or weaken, the University's undertaking to those commentators who have not chosen to share their remarks with the subject.

The importance of the confidentiality of the peer review process to the selection, promotion, and retention of an outstanding faculty can hardly be exaggerated. Further,

the rights of the authors of the evaluations to privacy deserve careful consideration. See *Board of Trustees of Leland Stanford Junior University v. Superior Court of Santa Clara County*, 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (May 28, 1981). We believe that the court below greatly undervalued these interests, and that if the amended opinion is permitted to stand, it will prevent or discourage trial courts from devising means to meet a plaintiff's needs for information while at the same time protecting both the privacy of the commentators, and the soundness and honesty of the process of peer evaluations of university faculty.

Respectfully submitted

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Appendix

Appendix

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Superior Court of the State of California
County of Santa Clara

No. P36243

EUGENE DONG, JR., M.D.,

Plaintiff,

v.

THE BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY, et al.,

Defendants.

DECLARATION OF GERALD J. LIEBERMAN

Date: April 26, 1980
Time: 9:30 a.m.
Place: Law and Motion

I, Gerald J. Lieberman, declare:

1. My name is Gerald J. Lieberman. I am Vice Provost and Dean of Research of Stanford University. I am also Professor of Operations Research and of Statistics. I have

been on the Stanford faculty since 1953, and have been Chairman of the Department of Operations Research, Associate Dean of Humanities and Sciences, and a member of the Advisory Board of the Academic Council from time to time. I am familiar with Stanford University's policy on access by faculty members to University records pertaining to their employment. I make this declaration in support of Stanford's opposition to Dr. Dong's motion to compel the production of documents.

2. Stanford's policy and practice are to afford faculty members access to material in the University's files which are used or have been used to determine that faculty member's qualifications for employment, promotion, additional compensation, termination or other disciplinary action with the exception of letters of reference. I understand "letters of reference" to include written evaluations of an individual's qualifications and competence, and written notes of oral evaluations, when used to determine employment, promotion, additional compensation, termination, or other disciplinary action. We do not permit a faculty member to inspect letters or memoranda of reference obtained under expectation of confidence. We have consistently followed this policy with respect to references from peers on the Stanford faculty, and consider that it is equally important that such internal letters of reference be preserved in confidence as those from outside the University.

3. It should be noted that faculty members at colleges and universities are almost unique in that their career steps are affected largely by the opinion of their qualifications formed by their peers and colleagues, rather than by the views of supervisory personnel. References from peers and colleagues outside the home institution are often

sought at critical decision points. The decisions—such as reappointment, promotion and grant of tenure—depend heavily, however, on the considered evaluation of other members of the same faculty, who are usually familiar with the quality of teaching and research of their colleagues, and are most able to give professional judgments on the basis of personal knowledge.

4. The quality of our faculty depends on the soundness of the faculty peer evaluations and the honesty with which they are expressed. We are persuaded that the need to encourage candor, and to assure our faculty that candor will not destroy collegial relations among faculty members, require that peer evaluations be held in confidence. That guarantee of confidentiality is critical in the context of investigations of alleged impropriety by a faculty member, such as those conducted by the Feigen and Raffel committees with respect to Dr. Lucas.

5. If the references were available to their subjects, we would expect some written evaluations from faculty members to be less complete and informative. This in turn would tend to impair the quality of the faculty by making it harder to arrive at sound judgments. In addition, the provision of confidential written references permits the faculty, in effect, to evaluate the evaluations—to consider the soundness of the observations and reasons given, and the degree of the writer's actual familiarity with the work of the person under consideration. If written references cannot be withheld from the person under consideration, we believe that fewer people will consent to give references in written form and the true basis of decisions would be concealed; some choices would have to be made on the

basis of views stated orally only, which may more easily be misunderstood and which provide no reliable record of the considerations taken into account in reaching decisions. The written record must be candid and complete to assure that the faculty meets the requisite standard of excellence and consists of the best people available in their fields.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 1980, at Palo Alto, California.

/s/ GERALD J. LIEBERMAN

Gerald J. Lieberman